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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1317.

P. CROWLEY, CHIEF OF POLICE OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, APPELLANT,

vs.

HENRY CHRISTENSEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 27, 1890.

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1 *Petition.*

In Circuit Court, State of California.

Petition of Henry Christensen for a writ of *habeas corpus*.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

To the honorable circuit court of the U. S., 9th circuit, northern district of the State of California:

Your petitioner humbly shows that he is thirty-five years of age, naturalized in the United States circuit court, at San Francisco, October 20th, in the year 1876, a citizen of the State of California, and has resided in the city and county of San Francisco for eighteen years last past.

That he was married to his present wife, Arnelia, on the 25th day of July, 1887, at the city and county of San Francisco, and said spouses have resided together in the married state up to this day at said place.

That he has never been accused of any crime.

That he has carefully obeyed all laws, ordinances, and regulations in force in said city and county since he has resided therein.

That he has carried on the business of a retail liquor dealer, with the approval and consent of the hon. board of police commissioners of said city and county, for over four years last past prior to June 10th, 1889.

That his last municipal license expired on the 17th of June, 1889.

That before the expiration of said license, on June 11th,
2 1889, he received notice from Sergeant T. D. McKenna that the hon. board of police commissioners had withdrawn consent to the issue of his municipal license.

That immediately thereafter he tendered in writing to the license collector of the said city and county the sum of $21.00 in United States gold coin, being the amount of the license fee required by the municipal order regulating the same.

That said license collector refused to issue said license for the reasons that said board of police commissioners had withdrawn its consent to the issue thereof.

That said consent was withdrawn without any charge being made or any notice given to the petitioner, or any hearing on a charge, or any confronting of accuser and accused, or any opportunity being given to petitioner to produce exculpatory evidence, or to cross-examine adverse witnesses, or to show the falsity of adverse testimony, if any such there might have been.

That immediately after receiving said notice from said sergeant your petitioner, in the most humble and supplicatory language, addressed said hon. board of police commissioners, requesting a hearing before said board in the matter of revoking said consent to the issue of his license.

That said hearing was accorded and the time thereof was fixed for June 24th, 1889.

That after said hearing was accorded and before said hearing was had, on June 21st, 1889, the said sergeant caused a subordinate policeman, named Thomas B. Gibson, to apply for and procure a warrant from the police court for the arrest of petitioner on
3 the charge of carrying on his said business of retail liquor dealer without a license, and petitioner is now in custody under said warrant.

That at the time of the application for said warrant the said sergeant and said Gibson well knew that petitioner was willing and ready to pay for and procure his license, and that he was precluded from obtaining the same by power which was irresistible, commonly called *vis major*, or the act of God, or of the law.

That the capital which petitioner has invested in his business amounts to his total fortune, on which he and his wife depend for support, and is of the value of $1,000, as it stood before it was blighted by the refusal of his license.

That under the blight of the refusal of his license he is forced to sell to one more fortunate than himself, at a ruinous sacrifice, or to retain the property, stock, pictures, and liquors without having any beneficial use thereof, while rent and taxes are eating him up, and petitioner and his wife are thus reduced to poverty.

That said sergeant threatens by repeated and cumulative arrests, before trial of petitioner before said hon. board of police commissioners and before the hearing of this petition, to destroy the lawful business of petitioner as a retail liquor dealer.

That this impetuous and hasty crushing of the business and destruction of the property of petitioner before hearing or judgment can have no other effect than to deprive petitioner of his property without due process of law.

Petitioner specifies the following grounds for his discharge from custody:

1st. That sec. 10 and subdivision XXXIX of order No. 1589
4 of the board of supervisors is invalid, because it is a violation of art. 14, sec. 1, of the Constitution of the United States.

2nd. That he has, as aforesaid, been deprived of his liberty by the State without due process of law.

3d. That he has, as aforesaid, been deprived of his property by the State without due process of law.

4th. That, as aforesaid, the State of California, by its officers, denies to him the equal protection of the laws and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States.

5th. That said order above cited is partial, unjust, and discriminating, and is outside of the legislative power to enact, because such an enactment is prohibited by sec. 1 of art. 14 of the United States Constitution, and petitioner specifies the following reasons:

A. Said order divides retail liquor dealers into a favored class, who pay $41 per quarter, without inspection or consent of the police commissioners; and

B. An unfavored class, who pay $21 per quarter for license, subject to consent by the hon. board of police commissioners.

C. A more unfavored class, from whom the consent of the hon. board of police commissioners is withheld.

D. Class C is again divided into E, those able to procure the signatures of twelve citizens owning real estate in the same block where the business of applicant is situated; the usual cost of the agitator who solicits the signatures is $50; and

F. Those who cannot afford to pay the agitator or procure the twelve signatures themselves.

G. There is another class who do business in locations where there are not twelve citizens owning real estate in the same block, and with them compliance with this provision *with* the order becomes impossible.

Your petitioner belongs to this class, as there are not more than seven property-owners in his block.

That by reason of the invalidity of the order which petitioner is thus charged with violating the police court had no jurisdiction to issue said warrant, and the complaint on which said warrant was issued charges no crime.

That petitioner is now in custody of the Hon. P. Crowley, chief of police, at the old city hall, in said city and county, under the authority of said warrant and not otherwise.

That a copy of said subdivision XXXIX of said sec. 10 of said order 1589 as amended by order 1845 is hereto annexed and made a parts of this petition:

Order No. 1845, approved January 19, 1886, amendatory of subdivision XXXIX of section 10 of order No. 1,589, imposing municipal licenses.

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. Subdivision XXXIX of section 10 of order No. 1589 is hereby amended so as to read as follows:

(Retail dealer's license.)

XXXIX. Every person who sells spirituous or malt or fermented liquors or wines in less quantities than one quart shall be designated as a "retail liquor dealer," and as a "grocery and retail liquor dealer," and shall pay licenses as follows:

First. Those making sales to the amount of fifteen thousand dollars and over per quarter shall pay a license of forty-one dollars per quarter.

Second. Those making sales of less than fifteen thousand dollars per quarter shall pay a license of twenty-one dollars per quarter, provided that on and after January 1, 1886, no license as a "retail liquor dealer" or as a "grocery and retail liquor dealer" shall be issued by the collector of licenses unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San

Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of "retail liquor dealer" or "grocery and retail liquor dealer" is to be carried on. All licenses issued under this section shall be known and designated as "retail liquor dealer" and "grocery and retail liquor dealer" license.

Third. Every person who sells cider, sarsaparilla, ginger pop or or soda or mineral water, except from a fountain, in quantities of less than one quart, shall, in addition to the license required to be paid, be subject to the conditions and provisions contained in subdivision three of this section. No license shall be required by physicians, surgeons, or apothecaries or chemists for any wines or spirituous liquors they may use in the preparation of medicines or which may be dispensed by them for medicinal purposes: Provided, however, that the same shall not be sold by the glass or be consumed on the premises of the vendor.

Fourth. Every person violating any of the provisions of this section, or falsely representing himself as being a citizen of San Francisco and owning real estate in the block or square therein specified, shall be guilty of a misdemeanor.

Petitioner is in custody under warrant and complaint, a copy of which is hereto annexed and made a part hereof.

6 In the Police Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
HENRY CHRISTENSEN.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Now comes J. F. SEWART, who, being duly sworn, deposes and says that on the 6th day of August, A. D. 1890, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by Henry Christensen (whose real name is unknown to this complainant), who then and there did wilfully and unlawfully engage in and carry on the business of the sale of spirituous, malt, and fermented liquors and wines in quantities less than one quart without having first taken out and procured the license required by order No. 1589 of the board of supervisors of said city and county of San Francisco, thereby violating the provisions of sections 1, 4, 2, and 5 and subdivision XXXIX of section 10 of order No. 1589 of board of supervisors of said city and county of San Francisco, as amended by order 1845 of said board, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California.

J. F. STEWART.

Res. or place of bus., —.

Subscribed and sworn to before me this 7th day of August, 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

7 *Warrant.*

Liquor license.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Police Court.

The people of the State of California to any sheriff, constable, marshal, or policeman in this State:

A complaint upon oath having been made this day before me, H. L. Joachimsen, judge of the police judge's court No. 2, by J. F. Stewart that the offense of misdemeanor, to wit, by violating the liquor-license law and an ordinance of the board of supervisors, by Henry Christensen, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of the board of supervisors of this city and county of San Francisco, as amended by order 1845 of said board, has been committed, and accusing Henry Christensen (real name unknown) thereof, you are therefore commanded forthwith to arrest the above-named accused (if pointed out) and bring him before me forthwith, at the police court, in the city hall, in this city and county of San Francico.

Witness my hand and the seal of the police court of the
[SEAL.] city and county of San Francisco this 7th day of August, A. D. 1890.

H. L. JOACHIMSEN,
Poilice Judge of No. 3 of the City and County of San Francisco.

8 Said complaint was made and said warrant was issued after petitioner had taken his writ of error to review the decision of our supreme court delivered Aug. 2nd, 1890.

Petitioner says that on Aug. 5th, 1890, he made a respectful application to the Hon. W. H. Beatty, chief justice of the supreme court, to allow a writ of error to review the late decision of the State supreme court, but said chief justice there and then refused to allow said writ, saying "there was no Federal question involved, that the case was rightly decided, and that he was a States' right man on this question."

Petitioner says that said refusal is unusual and is practically a denial of the equal protection of the law and contrary to the doctrine taught by the Supreme Court of the U. S., 111 U. S., 624.

Petitioner by this refusal is denied all protection by the State judiciary from the unlawful and cruel persecution and imprisonment prepared for him by the said Sergeant McKenna, and says that he will be crushed and ruined, in disregard of the solemn de-

cisions of the circuit court, in 13 Fed., 233, unless this Court interferes for his protection.

Petitioner further specifies, as grounds for his discharge, that the 39th sub., sec. 10, of order 1589, is invalid for the reason following:

Order 1589 was for the purpose of "imposing municipal licenses." It contained twenty-six sections. It was passed to print as a whole on the 19th day of July, 1880; and, after having been published five successive days, it was finally passed July 28th, 1880.

9 The provisions of said order as a whole were and are mutually dependent on each other. The method and manner of passing an ordinance laying a tax or imposing a new duty or penalty is prescribed by sec. 68 of the consolidation act, as follows:

"It shall, after the introduction in the board, be published, with the ayes and nays, in some city daily newspaper, at least five successive days, before final action by the board on the same. Every such ordinance, after the same shall pass the board, shall, before it takes effect, be presented to the president of the board for his approval.

"If he approves, he shall sign it; if not, he shall return it within 10 days to the board with his objections in writing.

"The board shall then enter the objections on the journals and publish them in some city newspaper.

"If, at any stated meeting thereafter, two-thirds of all the members elected to the board vote for such ordinance or resolution it shall then, despite the objections of the president, become valid.

"Should any such ordinance or resolution not be returned by the president within ten days after he receives it, it shall become valid the same as if it had received his signature."

There was an attempt made January 19th, 1886, to amend subdivision XXXIX of sec. 10 of order 1589, but order No. 1589, as thus amended, was not published or passed as required by section 68 of the consolidation act or by section 26 of the county government act of March 13, 1883.

Order No. 1589 was passed July 28th, 1880, — is the order we are charged with violating.

10 Order No. 1589 no longer remains the same as it was when it was published and passed and received its validity and laid the tax and imposed a new duty or penalty on us.

The county government act, being a general law, necessarily controlled the manner of enacting municipal orders, and to this extent the consolidation act must give way to the new method prescribed by the county government act as held in Stande *vs.* El Com., 61 Cal., and numerous other cases.

The complaint charges no offense, because the order 1589 being, as above shown, invalid, it cannot be violated.

The complaint charges no crime, and therefore the police court had no jurisdiction.

Ex parte Kearney, 55 Cal., 212.

The order on its face is unreasonable, unintelligible, in restraint of trade, contrary to public policy, and violative of art. 1, secs. 1, 11,

13, 14, 16, and 21; art. 3, sec. 1; art. 6, sec. 1, and art. 11, secs. 5, 11, of the constitution of California.

This order in one sentence seemed to exact a license, and in another it prohibits the issue of the desired license.

The order does not prohibit us from transacting our business as a retail liquor dealer without the written consent of the hon. board of police commissioners, which is what we have done.

The order seems to make it obligatory on the class of persons who can get licenses to procure them, but we are not in this class. *Ex parte* McNulty, 19 Pac. Rep., 237.

We want to get our license and tried to get it, and, having tendered $21 for a license, we stand in law as if the license was paid for. Sec. 1485, Civil Code.

11 People *v.* Harris, 29 Cal., 679.
People *vs.* White, 34 Cal., 183.
Ex parte Kearney, 55 Cal., —.

Petitioner shows that on June 28, 1889, he obtained from the State supreme court a writ of *habeas corpus*, and after much consideration said court, on Aug. 2nd, 1890, by a divided vote, Mr. Justice McFarland dissenting, remanded your petitioner.

Your petitioner immediately procured a writ of error to review the said decision in the Supreme Court of the U. S. and prepared a good and sufficient bond, which said bond was approved and accepted by the Hon. Davis Louderback, attorney for respondent, and service of said writ of error and citation was accepted by said Hon. Davis Louderback, and petitioner employed three clerks to copy the record, so as to speed the hearing of said case in Washington, in the U. S. Supreme Court.

That on August 6th, 1890, said McKenna procured a new warrant and arrested this petitioner on the same charge.

That on August 7th, 1890, petitioner stipulated in the police court that he would plead guilty if the Supreme Court decided against him, and asked said court to order a suspension of the multiplication of arrests until the validity of the order could be decided by the highest court. Said police court then and there refused to order such suspensions, and the prosecuting attorney and the said McKenna announced their intention of arresting your petitioner each and every day unless he would agree to their commands to discontinue and close his lawful business, and said McKenna, on August 7th, 1890, procured another warrant of arrest for your petitioner on the same charge.

12 Your petitioner then and there called the attention of said police court to *Re* Snow, 120 U. S., 274, and showed the illegality of the multiplication of these arrests.

Said police court would give no heed to the decision of the said Supreme Court of the U. S., and the multiplication of the arrests of your petitioner still continues.

Your petitioner says that the multiplication of arrests of petitioner is wholly unnecessary and is a cruel and wanton abuse of power, and has been and is done for the purpose of crushing the business of

petitioner in order to discourage petitioner from prosecuting his writ of error in the said Supreme Court of the U. S.

Petitioner says that our State supreme court is antagonistic to the principles of law contained in 118 U. S., 356, and that the decision given in our case on August 2nd, 1890, is in direct opposition to the ruling of said U. S. Supreme Court.

Petitioner says that unless relief is granted him by the circuit court his business will be crushed and he will be deprived by the State and her agents of his liberty and property without due process of law and denied by the State the equal protection of the law.

Your petitioner shows that he is not guilty of any crime, but that he has made tender of his license fee for each and every day during the pendency of these proceedings, but the collector refuses to accept the same.

Petitioner further shows that the police court has no jurisdiction under art. VI, sec. 5 of the State constitution to try the offense charged against petitioner, and by a proper plea he has
13 brought this objection to the notice of the court, but said court refuses to listen to the law or to decide according to law, but persists in multiplying the arrests of petitioner for the purpose of crushing your petitioner and destroying his lawful business by means of purely personal and abitrary power, contrary to the supreme law of the land as expounded by the Supreme Court of the United States.

Wherefore petitioner humbly prays that a writ of *habeas corpus* be granted by this honorable court, directed to the chief of police of said city and county, and that petitioner be restored to his liberty.

ALFRED CLARKE,
Att'y for Petitioner.

I certify the foregoing petition to be well founded in point of law.

ALFRED CLARKE,
Attorney for Petitioner.

14 *Petition.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

HENRY CHRISTENSEN, being duly sworn, deposes and says that he is petitioner in the above-entitled action; that he has read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters that he believes — to be true.

(S'g'd) HENRY CHRISTENSEN.

Subscribed and sworn to before me this 9th day of August 1890.

(S'g'd) F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

Let the writ issue in pursuance of the prayer of the petition, returnable forthwith before the United States circuit court.

August 11th, 1890.

(S'g'd) SAWYER,
Circuit Judge.

(Endorsed:) Filed August 11th, 1890. L. S. B. Sawyer, clerk.

15 *Writ of Habeas Corpus and Return Thereon.*

In the Circuit Court of the United States, Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus.*

The President of the United States of America to P. Crowley, chief of police of the city and county of San Francisco, Greeting:

You are hereby commanded that you have the body of Henry Christensen, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the honorable the circuit court of the United States for the northern district of California, at the court-room of said court, in the city and county of San Francisco, California, forthwith, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice [SEAL.] of the Supreme Court of the United States, this 11th day of August, A. D. 1890.

L. S. B. SAWYER, *Clerk.*

16 I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a true copy of the writ of *habeas corpus* issued in the within-entitled matter.

Attest my hand and seal of said circuit court this 11th day of August, A. D. 1890.

L. S. B. SAWYER, *Clerk.*

I hereby certify that on the 11 day of August, 1890, I received the writ of which the within is a copy, and that on the 11 day of August, 1890, at San Francisco, in this district, I personally served the said writ by delivering to and leaving the same with P. Crowley, chief of police, city & Co. S. F.

Dated San Francisco, Cal., Aug. 11, 1890.

W. G. LONG,
U. S. Marshal,
By S. P. MONCKTON,
Deputy Marshal.

Endorsed: No. 10817. Circuit court of the United States, northern district of California. In the matter of Henry Christensen on *habeas corpus*. Marshal's return of service of writ of *habeas corpus*. Filed on return this 11th day of August, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

17 *Return to Writ of Habeas Corpus.*

In the Circuit Court of the United States for the 9th Circuit, Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus*. No. 10817.

NORTHERN DISTRICT OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, the undersigned, P. Crowley, chief of police of the city and county of San Francisco, State of California, do hereby make this my return to the annexed writ of *habeas corpus* issued in the above-entitled matter, and do respectfully show and hereby certify—

That I am the person to whom said writ is directed.

That said Henry Christensen has been and is also known as and by the name of Harry Christensen.

That heretofore, to wit, on the 21st day of June, 1889, in said city and county of San Francisco, one T. B. Gibson duly made a complaint, under oath, in and before the police court of the said city and county of San Francisco, charging said Henry Christensen, by the name of Harry Christensen, with a public offense, and said complaint was on said 21st day of June, 1889, duly filed in said police court. A copy of said complaint is hereto annexed and marked
18 Exhibit "A," and is hereby referred to and made a part hereof.

That thereupon, on said 21st day of June, 1889, in said city and county, a warrant of arrest in due form of law was duly issued by said police court for the arrest of said Henry Christensen, by the name of Harry Christensen, and duly delivered to a police officer of said city and county, to wit, W. L. Cummings, for service. A copy of said warrant, marked Exhibit "B," is hereto annexed and is hereby referred to and made a part hereof.

That heretofore, to wit, on the 21st day of June, 1889, in said city and county, said police officer duly served said warrant and arrested said Henry Christensen, otherwise called Harry Christensen, under and by virtue thereof, and thereafter brought him before said police court for trial.

I do further certify and show that when the writ of *habeas corpus* herein was issued and when the same was served upon me the said criminal action against said Henry Christensen was pending in said police court for trial, and said Henry Christensen was in my custody, as such chief of police, in said city & county, under & by virtue of said warrant of arrest.

That the first part and section 1 of said order No. 1589 of the board of supervisors of said city and county of San Francisco is in the words and figures following—that is:

19 Order No. 1589, imposing municipal licenses.

The people of the city and county of San Francisco do ordain as follows:

Penalty.

SECTION 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not more than one thousand dollars or by imprisonment no more than six months or by both.

That sections 2, 4, 5, & 7 of said order No. 1589 are in the words and figures following—that is:

Municipal licenses.

SECTION 2. It shall be unlawful for any person to engage in or carry on any business, trade, profession, or calling for the transaction or carrying on of which a license is required without first taking out or procuring the license required for such business, trade, profession, or calling.

SECTION 4. Upon the trial of any criminal action brought under or arising from any provision or provisions of this order, the defendant shall be deemed not to have procured the municipal license required for the current time unless he or she either produces the same or proves having paid for the same to the proper officers.

Evidence of liability of party to pay license.

SECTION 5. In any action brought under or arising out of any of the provisions of this order the fact that a party thereto represented himself or herself as engaged in any business or calling for the transaction of which a license is by this order required, or that such party exhibited a sign indicating such business or calling shall be conclusive evidence of the liability of such party to pay for a license.

Date of license.

SECTION 7. All licenses for owners, keepers, and drivers of vehicles and hackney carriages and owners and keepers of boats shall date from the first day of January or July of each year, and shall be issued for one year from either of the aforesaid dates.

All licenses for vehicles shall date from the first day of January or July of each year, and shall be issued for one year from either of the aforesaid dates.

All licenses for drivers of hackney carriages and boatmen shall date from July of each year, and shall be issued for one year from the aforesaid date.

Licenses on all dogs shall expire on the first day of July of each year, and shall be issued for one year from the aforesaid date.

All licenses for street railroad passenger cars, insurance companies, runners and solicitors, peddlers of produce, fish, fruit, game, vegetables and merchandise from baskets or wagons shall date from the first day of January, April, July, or October of each year, and shall be issued for the term of three months: Provided, an application for the first time, and said application being made after the first day of the last month of the aforesaid quarter, then the collector of licenses may issue a license to the end of the succeeding quarter from the date of issuance.

All licenses for theatres, concert halls, places of amusement, entertainments, or exhibitions may be issued for the period of one year, for three months, for one month, and for one day.

All other licenses shall be issued for the period of three months, to date from the expiration of the last license or from the date that the applicant shall have commenced business for which a license shall be required.

That said order No. 1589 was duly passed by said board of supervisors of the city & county of San Francisco on the 26th day of July, 1880; that said order prior to said passage by said board was, after its introduction in said board, duly published with the ayes and nays, by order and direction of said board, in a city daily newspaper published daily in said city & county, and during the week immediately preceding said passage of and final action upon the same by said board, five successive days, according to law.

That said order was thereafter duly presented to the mayor and president of said board of supervisors, & on July 28, 1880, was duly signed & approved by said mayor and *ex officio* president of said board of supervisors of said city & county and duly returned to said board by said mayor; that said order No. 1589, after its approval and signature by said mayor and its return to said board of supervisors, was published with said signature and approval thereto, by direction of said board, in a daily newspaper in said city & county on three successive days, to wit, July 29, 30, & 31, 1880.

That subdivision XXXIX of section 10 of said order No. 1589 was thereafter amended by order No. 1845 of said board.

That order No. 1845 of said board is in the words and figures following—that is:

Order No. 1845, amendatory of subdivision XXXIX of section 10 of order No. 1589, imposing municipal licenses.

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. Subdivision XXXIX of section 10 of order No. 1589 is hereby amended so as to read as follows:

Retail dealer's license.

XXXIX. Every person who sells spirituous or malt or fermented liquors or wines in less quantities than one quart shall be designated

as a "retail liquor dealer" and as a "grocery and retail liquor dealer," and shall pay licenses as follows:

First. Those making sales to the amount of fifteen thousand dollars and over per quarter shall pay a license of forty-one dollars per quarter.

Second. Those making sales of less than fifteen thousand dollars per quarter shall pay a license of twenty-one dollars per quarter: Provided, that on and after January 1, 1886, no license as a "retail liquor dealer" or as a "grocer and retail liquor dealer" shall be issued by the collector of licenses unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of "retail liquor dealer" or "grocery and retail liquor dealer" is to be carried on. All licenses issued under this section shall be known and designated as "retail liquor dealer" and "grocery and retail liquor dealer" license.

Third. Every person who sells cider, sarsaparilla, ginger pop, or soda or mineral water, except from a fountain, in quantities of less than one quart shall, in addition to the license required to be paid, be subject to the conditions and provisions contained in subdivision three of this section. No license shall be required by physicians, surgeons, or apothecaries or chemists for any wines or spirituous liquors they may use in the preparation of medicines or which may be dispensed by them for medicinal purposes: Provided, however, that the same shall not be sold by the glass or be consumed on the premises of the vendor.

Fourth. Every person violating any of the provisions of this section or falsely representing himself as being a citizen of San Francisco and owning real estate in the block or square therein specified shall be guilty of a misdemeanor.

In board of supervisors, San Francisco, January 18, 1886.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Gates, Roy, Kunkler, Abbott, Farwell, Pond, Williamson, Farnsworth, Heyer, Gilleran, McMillan, Valleau.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, January 19, 1886.

WASHINGTON BARTLETT,

Mayor and ex Officio President Board of Supervisors.

That said order No. 1845 was duly passed by said board of supervisors on the 18th day of January, 1886; that said order prior to said passage by said board was, after its introduction in said
22 board, duly published, with the ayes and nays, by order and direction of said board, in a city daily newspaper published daily in said city and county, and during the week immediately

preceding the said passage and final action upon the same by said board, five successive days, according to law.

That said order was thereafter duly presented to the mayor and president of said board of supervisors, and on January 19th, 1886, was duly signed and approved by said mayor & *ex officio* president of said board of supervisors of said city and county and duly returned to said board by said mayor; that said order No. 1845, after its approval and signature by said mayor and its return to said board of supervisors, was published with said signature and approval thereto, by direction of said board, in a city daily newspaper in said city and county on three successive days, to wit, January 20, 21, & 22, 1886.

That the petitioner herein, Henry Christensen, has been by the order of said circuit court released on bail in these proceedings on *habeas corpus* pending the hearing of the same.

That licenses for persons to engage in or carry on the business of the sale of spirituous or malt or fermented liquors or wines in quantities less than one quart in said city and county, as required by said orders Nos. 1589 & 1845, are issued, as provided therein, for three months only—that is, from a certain date to a certain date, covering a period of three months, and each expire at the end of that period.

That to each and every issue of such quarterly license the written consent of a majority of the board of police commissioners of said city and county to carry on or conduct such business is required; that in those cases where the said police commissioners have
23 given such consent it is the understanding and practice between said board of police commissioners and the license collector of said city & county who, under said orders Nos. 1589 & 1845, issues such licenses, for the license collector to presume that the consent of said board of police commissioners is given to each subsequent issue of a license to the same person for the same place unless said license collector is notified by said board of police commissioners that the consent is withdrawn. In case of the withdrawal of said consent from a person having such an existing license the withdrawal is not as to that existing license, but the holder thereof, notwithstanding the said withdrawal, is considered to have the right and is permitted to carry on such business under said existing license till said license expires, and the withdrawal of such consent is as to any future license that may be applied for by the same person; that when the consent is withdrawn the said license collector and the party holding the license are immediately notified thereof and thus afforded an opportunity to apply to said board of police commissioners for such consent or apply to said board for a hearing in regard to the matter, which is accorded by said board of police commissioners, or to obtain the written recommendation of 12 citizens of San Francisco owning real estate in the block or square in which the business is or is to be carried on; that said board withdraws consent in those cases where it has reason or probable cause to believe that the business is not carried on or conducted in a manner consistent with the interest and objects

of good government and the laws—that is, where the place of business is a disorderly place or a place of crime or a nuisance to the neighborhood or a resort of drunkards, criminals, thieves, or vagrants, etc., etc., etc., or is conducted so as to be violative of the criminal laws & the rights of others; that said Henry Christensen applied on December 17, 1888, to said board of police commissioners for their consent to the issue to him of a retail liquor dealer's license to carry on such business at the northeast corner of Jackson & Kearny streets, in said city and county, under said order Nos. 1845 and 1589, & said consent was granted, and thereupon he obtained such license from the said license collector for the three months—that is, from Dec. 17, 1888, to March 17, 1889; that when said license was about to expire he obtained from the said license collector another such license for three months—that is, from March 17, 1889, to June 17, 1889—and the said license collector issued the same upon the presumed consent and understanding as aforesaid; that since said license expired, on June 17, 1889, said Christensen has not had any license under said orders, or any license whatever, to carry on such business; that on the 10th day of June, 1889, the said board of police commissioners, upon the report of a captain of police relative to the liquor saloon carried on by said Christensen under said last license, and which report was unfavorable thereto, and said board having reason to believe the business and place was carried on in such a manner as to be offensive and violative of the criminal laws and the rights of others, withdrew their said consent and all the said police commissioners withdrew their consent heretofore given, and on June 11, 1889, in said city and county, notified said Christensen of said withdrawal of said consent, and also on the same day notified said license collector of said withdrawal; that among other things said Christensen has always been, in carrying on said business and liquor saloon, assisted, and is assisted, by Amelia Christensen, whom he represents and claims to be his wife; that on the 8th day of April, 1889, one Lorenzo Neiblas was a visitor to said liquor saloon carried on by said Christensen and said Amelia Christensen was assisting therein; that said Amelia Christensen, on said April 8, 1889, in said city and county, feloniously, wilfully, & unlawfully stole, took, and carried away from said Nieblas the sum of one hundred and sixty dollars, in lawful current gold coin of the United States, of the moneys of said Nieblas; that afterwards said Amelia was duly arrested for said offense and examined in said city and county upon said charge of stealing said money before H. L. Joachimsen, a police judge of said city and county, and held by said judge to answer the said charge of grand larceny, in feloniously stealing, etc., said money; that afterwards, to wit, on October 10th, 1889, she was convicted of said offense in the superior court of said city and county, and on Nov. 11, 1889, said superior court rendered its judgment therein and sentenced her to imprisonment in the house of correction of said city and county for the term of one year; that she has appealed and has been released from custody on bail pending the appeal; that on July 7, 1889, in said city and county, and in said liquor saloon carried on by said

Harry Christensen, one Ivers Weden and one Gus. Anderson feloniously stole, took, & carried away from one Peter Anderson one watch and one scarf-pin of a value exceeding fifty dollars and of the personal property of Peter Anderson; that said Weden and Gus. Anderson were arrested therefor and examined on said charge
26 before a police judge of said city and county, & by said judge, on July 9th, 1889, held to answer on said charge of grand larceny for feloniously stealing, etc., said watch and scarf-pin.

That on June 19th, 1889, said Henry Christensen filed a petition with said board of police commissioners representing, among other things, that Amelia Christensen was his wife and was innocent of the said charge of grand larceny, & requesting "that he be allowed to carry on his business on probation until his wife has her trial," and also requesting a hearing by the board before the board decides to refuse a license. The said board decided to give him a hearing in the matter. That said board met on June 24, 1889, and that the said board generally holds weekly meetings, and since then there has been many meetings of the said board, and said Christensen or his attorney have not appeared before the board to proceed with the hearing. On the 8th day of July, 1889, he filed with the said board a written communication, & stating therein, among other things, that he had been arrested and that he had applied for a writ (meaning, it is presumed, a writ of *habeas corpus* before the supreme court of the State of California), and suggesting to said board that the matter lie on the table until after the court disposes of his case, and then he would offer his witnesses.

That he has ever since said June 17, 1889, the time his last license expired, carried on & is carrying on said business at the same place, in said city and county, without any license, in violation of said orders and the laws of said State.
27 That he has not at any time presented to said board of police commissioners any recommendation of any citizens, as provided by said order, or any recommendation whatever.

That said sergeant did not threaten by repeated or cumulative arrests before the trial of petitioner's petition before said board of police commissioners or before the hearing of the petition in this *habeas corpus* proceeding to destroy the business of petitioner, Henry Christensen, as a retail liquor dealer.

That the undersigned denies that there are not more than seven property-owners in the block or square in which is situated the said liquor saloon of said Harry Christensen, and avers and states that there were at all the times herein mentioned and are more than sixteen citizens of San Francisco owning real estate in the block or square in which said business of said Harry Christensen has been and is carried on.

That the undersigned denies that there is any usual cost or any cost of an agitator who solicits the signature of 12 citizens owning real estate in the block where the business is carried on.

Denies that there is any such thing or character or employment as an agitator in connection with such matters.

That the undersigned admits that said Henry Christensen has

been and is a citizen of the United States and a resident of
28 said city and county of San Francisco, and admits and alleges that he, Christensen, tendered, on or about June 13, 1889, to the said license collector the sum of 21 dollars in U. S. gold coin for a three months' license from June 17, 1889, and the license collector refused to issue to him such license as a retail liquor dealer to carry on such business at said place after June 17, 1889, for the reason that he had not the consent of a majority of the board of police commissioners to the issue of the same.

That on June 28, 1889, upon the petition, in due form of law, of said Harry Christensen, a writ of *habeas corpus* was issued by the supreme court of the State of California, directed to said chief of police; that said chief of police made due return to said writ as required by law, certifying therein, among other things, that he held said Henry Christensen in his custody under and by virtue of said warrant of arrest dated June 21, 1889, issued by said Hale Rix, judge of said police court, upon the complaint of T. B. Gibson, a copy of which is hereto annexed, marked Exhibit "B;" that said Henry Christensen was released on bail by said supreme court of the State of California pending the hearing of its *habeas corpus;* that said Henry Christensen made the same objections to the passage, enactment, publication, and validity of said orders of the said board of supervisors and said detention under said warrant as he has done in his present petition or complaint in the present *habeas corpus* proceedings before said circuit court; that said supreme court, owing to the pressure of its business, was not able to render its decision
29 therein till August 2nd, 1890, when it rendered its decision and judgment in banc, one judge, Justice McFarland, dissenting.

Said supreme court decided, among other things, that said orders were valid and consistent with the constitution & laws of the State of California and consistent with the Constitution and laws of the United States, etc., and that said detention was lawful, and said supreme court remanded said Henry Christensen to the custody of said chief of police on Aug. 2nd, 1890.

The undersigned admits that on August 4th, 1890, said Henry Christensen procured a writ of error from the clerk of the said circuit court of the United States for the 9th circuit, northern district of California, to review said decision and judgment of said supreme court, and also admits the allegations in the present complaint or petition in these present proceedings as to the bond to be given in such cases, the service of writ of error and citation, and employment of clerk to copy the record so as to speed the hearing of said cause in the Supreme Court of the United States.

The undersigned denies that said Henry Christensen has been arrested on the same charge, but alleges that during all the time since the issue of writ of *habeas corpus* by the supreme court of the State of California—that is, since June 28, 1889—till the decision and judgment of supreme court therein, on Aug. 2nd, 1890, and up to August 4, 1890, said Henry Christensen was not arrested upon any charge of carrying on the sale of liquors without the license re-

quired by said orders of the said board of supervisors on
30 account of the pendency of said proceedings before said supreme court; that from said June 28, 1889, said Henry Christensen has continued to violate and is violating the law by carrying on said business at the said place without license, as required by said orders of said board of supervisors; that after the said decision and judgment of said supreme court said Henry Christensen still refusing to obey the law, one C. F. Castor, on the 5th day of August, 1890, in said city and county of San Francisco, duly made a complaint under oath in and before the police court of the said city and county of San Francisco charging said Henry Christensen, by the name of John Doe, with a public offense, and said complaint was, on said 5th day of August, 1890, duly filed in said police court. A copy of said complaint is hereto annexed, marked Exhibit "C," and is hereby referred to and made a part hereof.

That thereupon, on said 5th day of August, 1890, in said city and county, a warrant of arrest, in due form of law, was duly issued by said police court for the arrest of said Henry Christensen, by said name of John Doe, and duly delivered to a police officer of said city and county, to wit, T. D. McKenna, for service. A copy of said warrant, marked Exhibit "D," is hereto annexed, and is hereby referred to and made a part hereof.

That heretofore, to wit, on the 5th day of August, 1890, in said city and county, said police officer duly served said warrant and arrested said Henry Christensen under and by virtue thereof and thereafter brought him before said police court for trial.

31 That heretofore, to wit, on the 6th day of August, 1890, in said city and county of San Francisco, one L. Webster duly made a complaint under oath in and before the police court of said city and county of San Francisco charging said Henry Christensen with a public offense, and said complaint was, on said 6th day of August, 1890, duly filed in said police court. A copy of said complaint is hereto annexed and marked Exhibit "E," and is hereby referred to and made a part hereof.

That thereupon, said 6th day of August, 1890, in said city and county, a warrant of arrest, in due form of law, was duly issued by said police court for the arrest of said Henry Christensen and duly delivered to a police officer of said city and county, to wit, M. J. Conboy, for service. A copy of said warrant, marked Exhibit "F," is hereto annexed, and is hereby referred to and made a part hereof.

That heretofore, to wit, on said 6th day of August, 1890, in said city and county of San Francisco, said police officer duly served said warrant and arrested said Henry Christensen under and by virtue thereof, and thereafter brought him before said police court for trial.

That heretofore, to wit, on the 7th day of August, 1890, in said city and county of San Francisco, one John F. Stewart duly made a complaint under oath in and before the police court of the said city and county of San Francisco charging said Henry Christensen with a public offense, and said complaint was, on said 7th day of
32 August, 1890, duly filed in said police court. A copy of said

complaint is hereto annexed, marked Exhibit "G," and is hereby referred to and made a part hereof.

That, thereupon, on said 7th day of August, 1890, in said city and county, a warrant of arrest in due form of law was duly issued by said police court for the arrest of said Henry Christensen and duly delivered to a police officer of said city and county, to wit, W. L. Cummings, for service. A copy of said warrant, marked Exhibit "H," is hereto annexed and is hereby referred to and made a part hereof.

That heretofore, to wit, on the 7th day of August, 1890, in said city and county, said police officer duly served said warrant and arrested said Christensen under and by virtue thereof, and thereafter brought him before said police court for trial.

That heretofore, to wit, on the 11th day of August, 1890, and before said Henry Christensen applied to said circuit court for the writ of *habeas corpus* in these present proceedings, he voluntarily surrendered himself to said chief of police upon the charge that was the subject-matter of consideration before said supreme court on *habeas corpus*—that is, surrendered himself into custody under the warrant dated June 21, 1889, a copy of which is hereto annexed and marked Exhibit B.

That at the time the writ of *habeas corpus* herein was served on or delivered to the undersigned as said chief of police he, as
33 said chief of police, had and detained said Henry Christensen in his custody in said city and county under and by virtue of all said warrants hereinbefore mentioned.

The undersigned denies that said Henry Christensen stipulated in the police court that he would plead guilty if the supreme court decided against him or asked said court to order a suspension of the multiplication of arrests until the validity of the order could be decided by the highest court, or said police court refused to order said suspension or took action thereon, or that the prosecuting attorney or said McKenna announced their or his intention of arresting said petitioner each and every day unless he would agree to their command to discontinue and close his lawful business.

That there is no purpose and no arrest or arrests have been made for the purpose of crushing the business of said petitioner in order to discourage petitioner from the prosecution of his writ of error in the said Supreme Court of the United States. On the contrary, the undersigned does not object, but consents to the prosecution of said writ of error.

The undersigned denies that said Henry Christensen has been deprived of his liberty or property without due process of law or denied the equal protection of the law by the State or its officers or agents or by any person.

The undersigned alleges that said Henry Christensen is
34 guilty of the crimes as alleged in the said complaints in said police court hereinbefore mentioned, and the undersigned denies that said Christensen has tendered his license fee for each and every day during the pendency of these proceedings, but admits that he tendered the license collector 21 dollars for a liquor license under said orders for the 3 months commencing June 17, 1889; that

he also tendered on Sep. 16, 1889, to said license collector 21 dollars for such a liquor license for the 3 months commencing Sep. 17th, 1889; that he also tendered on Dec. 17, 1889, to said license collector 21 dollars for such a liquor license for the 3 months commencing Dec. 17, 1889, and that he also tendered on March 15, 1890, to said license collector 21 dollars for such a liquor license for the three months commencing March 17, 1890; that said license collector refused in each instance of such tender to issue such a license, because said Henry Christensen did not have the consent of a majority of the board of police commisssoners as required by said orders, or at all, to the issue of the same.

I do further certify and show that when the writ of *habeas corpus* herein was issued and when the same was served upon me all the said criminal actions against said Henry Christensen were pending in said police court for trial, and said Henry Christensen was in my custody as such chief of police in said city and county under and by virtue of said warrants of arrest.

That the undersigned denies each and every, all and singular,
35 the allegations of said Henry Christensen's petition or complaint in this matter, except as to those matters and facts which are stated or admitted herein.

In witness whereof I have hereunto set my hand this 13th day of August, 1890.

(S'g'd) P. CROWLEY,
Chief of Police of the City and County of San Francisco.

EXHIBIT A.

In the Police Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA }
against }
HARRY CHRISTENSEN. }

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Complaint under section 1426, Penal Code.

Now comes T. B. GIBSON, who, being duly sworn, deposes and says that on or about the 20th day of June, A. D. 1889, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by Harry Christensen (whose real name is unknown to this complainant), who then and there did wilfully and unlawfully engage in and carry on the business of the sale of spirituous, malt, and fermented liquors and wines in quantities less than one quart without having first taken out and procured the license required by order No. 1589 of the board of supervisors of said city and county of San Francisco, thereby violating the provisions of sections 1, 2, and 5 and subdivision XXXIX of

section 10 of order No. 1589 of board of supervisors of said city and county of San Francisco, as amended by order 1845 of said board, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California.

THOS. B. GIBSON.

Res. or place of bus., —.

Subscribed and sworn to before me this 21st day of June, 1889.

HALE RIX,
Judge of the Police Court of the City and County of San Francisco.

Endorsed: Filed in the police court of the city and county of San Francisco this Friday, June 21, 1889. C. H. McCourtney, clerk.

36 EXHIBIT B.

Warrant and return thereon.

Warrant.

Liquor license.

STATE OF CALIFORNIA, *City and County of San Francisco,* } ss:

Police Court.

The people of the State of California to any sheriff, constable, marshal, or policeman in this State:

A complaint upon oath having been this day made before me, Hale Rix, police judge, by T. B. Gibson, that the offense of misdemeanor, to wit, by violating the liquor-license law and an ordinance of the board of supervisors by Harry Christensen, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of the board of supervisors of this city and county of San Francisco, as amended by order 1845 of said said board, has been committed, and accusing Harry Christensen (real name unknown) thereof, you are therefore commanded forthwith to arrest the above-named accused (if pointed out) and bring him before me forthwith, at the police court, in the city hall, in this city and county of San Francisco.

Witness my hand and the seal of the police court of the [SEAL.] city and county of San Francisco this 21st day of June, A. D. 1889.

HALE RIX.
Police Judge of the City and County of San Francisco.

(over)

[Endorsed.]

EXHIBIT A.

Warrant.

Police Court.

THE PEOPLE
vs.
HARRY CHRISTENSEN.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

To the honorable the police court of the city and county of San Francisco:

I, the undersigned, police officer, do hereby make this my return to this warrant, and do hereby certify that I have executed and served this warrant by arresting the within-named defendant this 21st day of June, A. D. 1889, who at the time of the arrest declares his true name to be Harry Christensen, and I do herewith bring said defendant before the honorable the judge of the police court, as commanded in this warrant.

WM. L. CUMMINGS,
Police Officer of the City and County of San Francisco.

Filed in the police court of the city and county of San Francisco this Saturday, June 22, 1889.

JNO. J. KENNY, *Clerk.*

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Police Court.

The within-named defendant may be admitted to bail, by bond, in the sum of 200 dollars, or by the deposit of 100 dollars in coin.

HALE RIX,
Judge of the Police Court of the City and County of San Francisco.

EXHIBIT C.

In the Police Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
JOHN DOE.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Now comes C. F. CASTOR, who, being duly sworn, deposes and says

that on the 4th day of August, A. D. 1890, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by John Doe (whose real name is unknown to this complainant), who then and there did wilfully and unlawfully engage in and carry on the business of the sale of spirituous, malt, and fermented liquors and wines in quantities less than one quart without having first taken out and procured the license required by order No. 1589 of the board of supervisors of said city and county of San Francisco, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of board of supervisors of said city and county of San Francisco, as amended by order 1845 of said board, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California.

C. F. CASTOR.

Res. or place of bus., —.

Subscribed and sworn to before me this 5th day of August, 1890.

A. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

37 Endorsed: Filed in the police court of the city and county of San Francisco this Tuesday, August 5, 1890. C. H. McCourtney, clerk.

EXHIBIT D.

Warrant and return thereon.

Warrant.

Liquor license.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Police Court.

The people of the State of California to any sheriff, constable, marshal, or policeman in this State:

A complaint upon oath having been this day made before me, H. L. Joachimsen, judge of the police court, by C. F. Castor, that the offense of misdemeanor, to wit, selling liquor without a license, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of the board of supervisors of this city and county of San Francisco, as amended by order 1845 of said board, has been committed, and accusing John Doe (real name unknown) thereof, you are therefore commanded forthwith to arrest the above-named accused (if pointed out) and

bring him before me forthwith, at the police court, in the city hall, in this city and county of San Francisco.

[L. s.] Witness my hand and the seal of the police court of the city and county of San Francisco, this 5th day of August, A. D. 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

(over)

[Endorsed.]

EXHIBIT D.

Warrant.

Police Court.

THE PEOPLE
vs.
HENRY CHRISTENSEN.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

To the honorable the police court of the city and county of San Francisco:

I, the undersigned, police officer, do hereby make this my return to this warrant, and do hereby certify that I have executed and served this warrant by arresting the within-named defendant this 5th day of August, A. D. 1890, who at the time of the arrest declares his true name to be Henry Christensen, and I do herewith bring said defendant before the honorable the judge of the police court, as commanded in this warrant.

T. D. McKENNA,
Police Officer of the City and County of San Francisco.

Filed in the police court of the city and county of San Francisco this Wednesday, Aug. 6, 1890.

C. H. McCOURTNEY, *Clerk.*

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Police Court.

The within-named defendant may be admitted to bail, by bond, in the sum of — dollars or by the deposit of — dollars in coin.

——, ——,
Judge of the Police Court of the City and County of San Francisco.

38 EXHIBIT E.

In the Police Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
HENRY CHRISTENSEN.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Now comes L. WEBSTER, who, being duly sworn, deposes and says that on the 5th day of August, A. D. 1890, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by Henry Christensen (whose real name is unknown to this complainant), who then and there did wilfully and unlawfully engage in and carry on the business of the sale of spirituous, malt, and fermented liquors and wines in quantities less than one quart without having first taken out and procured the license required by order No. 1589 of the board of supervisors of said city and county of San Francisco, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of board of supervisors of said city and county of San Francisco, as amended by order 1845 of said board, contrary to the form force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California.

L. WEBSTER.

Res. or place of bus., —.

Subscribed and sworn to before me this 6th day of August, 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

Endorsed: Filed in the police court of the city and county of San Francisco this Wednesday, Aug. 6, 1890. C. H. McCourtney, clerk.

EXHIBIT F.

Warrant and return thereon.

Warrant.

Liquor license.

STATE OF CALIFORNIA,
y and County of San Francisco, } ss:

Police Court.

The people of the State of California to any sheriff, constable, marshal, or policeman in this State:

A complaint upon oath having been this day made before me,

H. L. Joachimsen, judge of the police court, by L. Webster that the offense of misdemeanor, to wit, selling liquor without a license, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of the board of supervisors of this city and county of San Francisco, as amended by order 1845 of said board, has been committed, and accusing Henry Christensen (real name unknown) thereof, you are therefore commanded forthwith to arrest the above-named accused (if pointed out) and bring him before me forthwith, at the police court, in the city hall, in this city and county of San Francisco.

Witness my hand and the seal of the police court of the [L. S.] city and county of San Francisco this 6th day of August, A. D. 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

(over)

[Endorsed.]

EXHIBIT F.

Warrant.

Police Court.

THE PEOPLE
vs.
HENRY CHRISTENSEN.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

To the honorable the police court of the city and county of San Francisco:

I, the undersigned, police officer, do hereby make this my return to this warrant, and do hereby certify that I have executed and served this warrant by arresting the within-named defendant this 6th day of August, A. D. 1890, who at the time of the arrest declares his true name to be Henry Christensen, and I do herewith bring said defendant before the honorable the judge of the police court, as commanded in this warrant.

M. J. CONBOY,
Police Officer of the City and County of San Francisco.

Filed in the police court of the city and county of San Francisco this Thursday, Aug. 7th, 1890.

C. H. McCOURTNEY, *Clerk.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Police Court.

The within-named defendant may be admitted to bail, by bond, in the sum of 200 dollars, or by the deposit of 100 dollars in coin.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

39 Copy.

EXHIBIT G.

In the Police Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA }
against }
HENRY CHRISTENSEN. }

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Now comes JOHN F. STEWART, who, being duly sworn, deposes and says that on the 6th day of August, A. D. 1890, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by Henry Christensen (whose real name is unknown to this complainant), who then and there did willfully and unlawfully engage in and carry on the business of the sale of spirituous, malt, and fermented liquors and wines in quantities less than one quart without having first taken out and procured the license required by order No. 1589 of the board of supervisors of said city and county of San Francisco, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of board of supervisors of said city and county of San Francisco, as amended by order 1845 of said board, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California.

JOHN F. STEWART.

Res. or place of bus., —.

Subscribed and sworn to before me this 7th day of August, 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

Endorsed: Filed in the police court of the city and county of San Francisco this Thursday, Aug. 7, 1890. ——, ——, clerk.

Copy.

EXHIBIT H.

Warrant and return thereon.

Warrant.

Liquor license.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

The people of the State of California to any sheriff, constable, marshal, or policeman in this State:

A complaint upon oath having been this day made before me, H. L. Joachimsen, judge of the police court, by John F. Stewart, that the offense of misdemeanor, to wit, selling liquor without a license, thereby violating the provisions of sections 1, 2, 4, and 5 and subdivision XXXIX of section 10 of order No. 1589 of the board of supervisors of this city and county of San Francisco, as amended by order 1845 of said board, has been committed, and accusing Henry Christensen (real name unknown) thereof, you are therefore commanded forthwith to arrest the above-named accused (if pointed out) and bring him before me forthwith, at the police court, in the city hall, in this city and county of San Francisco.

Witness my hand and the seal of the police court of the
[L. S.] city and county of San Francisco this 7th day of August, A. D. 1890.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

(over)

[Endorsed.]

EXHIBIT H.

Warrant.

Police Court.

THE PEOPLE }
vs.
HENRY CHRISTENSEN. }

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

To the honorable the police court of the city and county of San Francisco:

I, the undersigned, police officer, do hereby make this my return to this warrant and do hereby certify that I have executed and served this warrant by arresting the within-named defendant this

7th day of August, A. D. 1890, who at the time of the arrest declares his true name to be Henry Christinsen, and I do herewith bring said defendant before the honorable judge of the police court, as commanded in this warrant.

W. L. CUMMINGS,
Police Officer of the City and County of San Francisco.

Filed in the police court of the city and county of San Francisco this Friday, Aug. 8, 1890.

C. H. McCOURTNEY, *Clerk.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Police Court.

The within-named defendant may be admitted to bail, by bond, in the sum of 200 dollars, or by the deposit of 100 dollars in coin.

H. L. JOACHIMSEN,
Judge of the Police Court of the City and County of San Francisco.

40 Endorsed: Service of the within return and a receipt of a copy thereof is hereby admitted this 13th day of August, 1890. Alfred Clarke, att'y for petitioner.

In the Circuit Court of the United States, Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus.*

The President of the United States of America to P. Crowley, chief of police of the city and county of San Francisco, Greeting:

You are hereby commanded that you have the body of Henry Christensen, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the honorable the circuit court of the United States for the northern district of California, at the court-room of said court, in the city and county of San Francisco, California, forthwith, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

41 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of August, A. D. 1890.

[SEAL.]

L. S. B. SAWYER, *Clerk.*

Endorsed: Filed on return this 13th day of August, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

42 *Exceptions to the Return.*

In the Circuit Court of the U. S. of the Ninth Judicial Circuit Northern District of California.

Ex Parte CHRISTENSEN on *Habeas Corpus*. No. 10817.

Now comes the petitioner and excepts to the sufficiency of the return on the ground that the facts stated in the return do not show any lawful cause for the detention of the petitioner.

Petitioner specifies the following exceptions to the return:

1st. It appears from the return, page 4, line 25, to page 6, line 14, that an attempt was made January 18th, 1886, to amend sub. XXXIX of § 10 of order 1589.

On the 13th day of March, 1883, the Legislature in the execution of the power contained in art. XI, §§ 5 and 12, of the constitution passed the county gov't act (stat., 1883, p. 299).

43 Said act was and is a general law regulating, prescribing, and defining the powers and duties of the boards of supervisors in every county in the State, and it repealed (§ 184) all laws in conflict therewith, and it repealed § 68 of the consolidation act in so far as it conflicted with its provisions.

Kennedy *v.* Bd. Ed., Jan. 9th, 1890.
Ex parte Ah You, Jan. 1st, 1890.
Pennie *v.* Reis, 22 Pac. Rep., 192.

Said act is the only authority for the collection of municipal taxes in San Francisco under the new constitution, and prescribes the only rule in force regulating the method of exercising said power. Conformity to the method is essential.

State *v.* Patterson, 4 S. E. Rep., 351, by supreme court of North Carolina, Dec. 5th, 1887.
People *v.* Russell, 74 Cal., 578.
Monterey *v.* Abbott, 77 Cal., 541.

44 It appears from the return that order 1845 was not passed in accordance with the provisions of § 26 of the county gover-ment act.

2nd. It appears from the return that § 1 of order 1589, quoted on p. 2 of the return, is in direct conflict with § 435 of the penal code.

The order appears to be a law of this State (69 Cal., 611) and under the ruling *In re* Sec., 73 Cal., 1495 the whole order 1589 must be held to be void.

3rd. It appears from p. 3 of the return that §§ 4 and 5 of order 1589 conflict with the provisions of §§ 1823 to 2104 of the Code of Civil Procedure relating to evidence.

The powers of the board of supervisors are limited by art. XI, § XI, of the constitution and subdivision 33 of § 25 of the county gover-ment act to the passage of such orders as are not in
45 conflict with general laws.

Order 1589 is void because it attempts in § 12 thereof to

define the meaning of words, and thus conflicts with §§ 16 and 17 of the Political Code and other general laws.

"Municipal corporations have no authority to change the meaning of words."

Mayor *v.* Cin., 1 Ohio St., 268.

As the law required the whole order to be printed together in one print, it cannot be held to be part valid and part void, as might be the case with a statute.

"It conflicts with the State law and is void." (73 Cal., 149.)

It appears from order 1589, which by the return has become a part of the respondent's justification, that sub. XXXIX, as
46 amended Jan. 19th, 1886, was repealed March 9th, 1886, by order 1848, and again repealed March 2nd, 1887, by order 1899. (6 Cal., 384; 39 Cal., 313; 63 Cal., 268; 68 Cal., 303; 69 Cal., 611.)

The petitioner demurs specially to the return because the amendments to § 10 of order 1589, particularly order 1848 and order 1899, are not pleaded by the respondent.

Order 1845 is void because it conflicts with art. XIV of our Federal Constitution, as expounded by the Supreme Court in Yick Wo *v.* Hopkins, 118 U. S., 357.

The order creates a government of men and not of laws. It prescribes no rule by which the conduct or action of its ministers can be regulated. It places the individual minister above the
47 law, and makes his will the law for the time being. This result is contrary to the supreme law of the land since the evolution of the maxim (A. D. 1886) "that we shall have a government of laws and not of men." (118 U. S., 356.)

"No man's rights under a constitutional gover-ment can be submitted to the discretion of anybody."

Re Fraser, 30 N. W. R., 72.
People *v.* Hang, 37 N. W. R., 24.
State *v.* Ryan, 36 " " 828.
Anderson *v.* Wellington, 19 Pac., 719.
St. Louis *v.* Wehring, 50 Ill., 28.

Order 1845 operates so as to grant special privileges, and is class legislation, and thereby violates art. 1, § 21, of our State constitution.

Order 1845 conflicts with the State law relating to license. The provision "No license shall be issued" stands in contradic-
48 tion to the power to fix the license and provide for the collection of the same by suit or otherwise. (§ 25 sub. 27, county gover-ment act.)

Order 1845 is void for unreasonableness and uncertainty. No person can be punished for non-performance when prevented by *vis major*. (Civil Code, § 3526.)

Order 1845 is void for a- "absurdity," "provided the (medicine) shall not be sold by the glass or consumed on the premises of the vendor."

Order 1845 is void for deficiency of statement.

The reference to sub. 3 is suicidal. It should have been reprinted in full. (74 Cal., 578; Constitutional Cal., art. IV, § 26; 6 Southern Reporter, 120.)

Order 1845, as enforced against us, violates the XIV art. of
49 our Federal Constitution and article 1, §§ 13 and 21, of our State constitution. It appears from the return that the withdrawal of consent to the issue of our license on June 10, 1889, was done without hearing or notice, on the report of a police captain, as shown upon page 8, line 20, of the amended return.

Petitioner demurs specially to the return, because this report is not pleaded in order that a legal construction may be placed upon it by this court.

Petitioner asked that respondent be allowed to amend his return and plead the report.

We were entitled to hearing and notice before the withdrawal of a consent on which our business and living depended, and the de-
nial of that right before the arrest was a violation of the 14th
50 art. Dent *v.* W. Va., 9 S. E. Reporter (U. S.), 233; Paulsen *v.* Portland, 19 Pac., 453; Charnin *v.* Valeton, 20 Pac., 659; Huston *v.* Woodbridge, 79 Cal., 90.

14th. Petitioner demurs specially to all of the narrative contained in the return between the end of line 22, on p. 6, to the end of line 7, on p. 10 thereof, on the ground that said narrative is ambiguous, unintelligible, and uncertain and fails to state facts, and states conclusions of law which should be shown by pleading the orders and not by the interpretation of individuals.

15th. Petitioner demurs specially to all of the return on p. 7 to p. 10 thereof, relating to the license collector, on the ground that the duties of the license collector are prescribed by order 1189, §§ 21 to 26 thereof, and should be shown by pleading the order and not otherwise.

51 16th. Petitioner demurs specially to all of the return on pages 7 to 10 thereof, relating to the understanding and practices of the license collector or other officers, on the ground that the ordinance governing the duties of such officers should be pleaded in order that this court may construe the same.

17th. Petitioner demurs specially to all of the return on page 9 thereof, relating to the wife of petitioner, on the ground that said return shows that an appeal in her case is now pending in this court. His wife may yet be acquitted.

—. Petitioner demurs specially to all of the return on page 9, lines 27 to 29, and page 10, lines 1 to 7, on the ground that
52 any wrong committed on July 7th, 1889, is immaterial to the revocation on June 10th, 1889, and the arrest of petitioner on June 21st, 1889, and on the further ground that the return does not show the petitioner had any guilty knowledge of said transaction. (Deodands are abolished, § 677, Penal Code.)

19th. Petitioner demurs specially to the narrative on p. 10, lines 9 to 14, of the return, because it does not show that any written charge was made against or served on petitioner prior to the revo-

cation of the permit on June 10th, 1889, or prior to the arrest of the petitioner on June 21st, 1889.

The return shows that on June 19th petitioner requested a hearing; that on June 21st he was jailed, and that the hearing on the 24th of June could not restore him to his position as he stood before his arrest.

53 20th. Petitioner demurs specially to the averment on p. 11, lines 4 to 6, of the amended return, — shows that he was arrested before he could furnish recommendation, and on the ground that no facts are shown by the return which required the presentation by petitioner of any recommendation, and on the ground that such recommendation cannot be required. (*Re* Quong Woo, 13 Fd., 229.)

21st. Petitioner demurs specially to the averment on p. 11, lines 15 to 17, of the amended return, because what petitioner has done since the writ issued, June 28, 1889, is irrellevant to the legality of his arrest on June 21st, 1889, and also because it states a conclusion of law made by respondent and not by the court, and on the further ground that the return, p. 12, lines 5 to 14, shows that on June 13th, 1889, petitioner tendered $21 in U. S. gold coin to the license

54 collector for his license, and said collector refused to issue the same.

22nd. Petitioner demurs specially to the averment on page 10, line 28, to p. 11, line 2, of the amended return, on the ground that it states a conclusion of law in regard to the meaning of said orders, and on the further ground that the return shows, p. 12, lines 5 to 14, that petitioner on the 13th day of June, 1889, tendered $21 in U. S. gold coin to the license collector for his license, and said collector refused to issue the same.

23rd. Petitioner demurs specially to the return because it nowhere appears from said return that the license collector demanded payment of petitioner's license, or that petitioner refused to pay the same, or that the license collector or board of supervisors (see order

55 1589, § 23) authorized any prosecution to be instituted against petitioner for transacting business without a license.

Petitioner refers to art. 6, § 20, of the constitution, and says that the return shows that this prosecution has not been brought by the district attorney, § 4256, Pol. Code, in the superior court, where, under art. 6, § 5, of the State constitution, the jurisdiction is vested, and the return shows that the prosecution of petitioner in the police court is not instituted by authority of the people.

24. The police court had no jurisdiction of the subject of the action. Const., art. 6 is void.

Petitioner demurs specially to the complaint shown in the return because it charges no crime.

56 It fails to state (except inferentially) that there is any order 1589 or 1845, and inferential pleading is not permissible. (Hazard *v.* Volger, 18 Pac., 637.) Municipal orders must be pleaded and proved.

McDonald *v.* Lane, 5 S. E. Rep., 629.

Norton *v.* State, 3 So. Rep., 666.

The police court had no jurisdiction to issue the warrant.

Wherefore petitioner prays that his exceptions to the return be sustained, and that respondent be allowed to amend his return by pleading the amendments to § 10 of order 1589, and particularly orders 1848 and 1899, and by pleading the duties of the license collector under order 1589, as amended, up to June 21st, 1889, and by
57 pleading the report of the captain of police, which is referred to on p. 8, line 24, of the amended return, and that petitioner have such other or further or different relief as this court may deem just or this case may require.

Respectfully submitted.

ALFRED CLARKE,
Counsel for Pet'r.

Rooms 12 & 13 Court block, Clay St., San Francisco, Cal.

In case these exceptions are overruled your petitioner asks to be allowed to deny or controvert any of the material facts or matters set forth in the return, and to allege such facts as may show that he is entitled to his discharge.

58 I certify that the foregoing exceptions are well founded in point of law.

ALFRED CLARKE,
Att'y for Petitioner.

Service of the within is hereby admitted this 13th day of August, 1890.

DAVIS LOUDERBACK,
Att'y for Respondent & the People.

Endorsed: Filed August 18, 1890. L. S. B. Sawyer, clerk.

59 In the Circuit Court of the U. S., Ninth Circuit, Northern District of Cal.

In Re HENRY CHRISTENSEN. No. 10817.

Traverse to Return.

Now comes petitioner and, without waving his demurrer and exceptions to the return, says that the report was made by J. W. Gillen, who is not a captain of police, but was a policeman, and said report is mere hearsay and not receivable as evidence.

Referring to page 9 of the return, petitioner says that Gillen's report locates the theft of Neiblas at No. 120 Montgomery Ave., and not in petitioner's saloon.

Petitioner says that his wife Amelia is not guilty, and her case is pending in the supreme court.

Petitioner says that Ives Weden and Gus. Anderson were acquitted in the supreme court August 28th, 1889.

Referring to page 11 of return, petitioner says that about Christ-

mas, 1889, he presented a petition signed by all the police officers in his bailiwick.

Petitioner joins issue with respondent as to lines 5 to 1 of page 11.

Said sergeant did so threaten, and in pursuance and execution of his threat he has needlessly and maliciously caused petitioner to be arrested every day since August 4th, 1890, and needlessly, vindictively, and maliciously caused the bail of petitioner to be raised from 200 to 500, for the purpose of crushing petitioner while his issue of law was still undetermined in the circuit court.

60 Petitioner takes issue with respondent, lines 20 to 25 of page 11, and refers to the affidavit of George Humphrey, the agitator, here on file.

Petitioner says the return is evasive, and that in addition to the four warrants shown in the return the respondent holds petitioner on ten other warrants, which have been procured by said McKenna for the purpose of distressing petitioner and discouraging petitioner in his resistance to the arbitrary and unlawful persecution instituted and maintained by said McKenna.

Petitioner joins issue with respondent on his averments, lines 4 to 14 of page 17 of return, and affirms that the allegations of his petition here on file are true, and, by his reference, he pleads all the facts stated in said petition in denial of each and every allegation in the return.

Petitioner joins issue with respondent on lines 16 to 21, on page 17 of return, and petitioner says that said McKenna spends ten cents a day to send persons to get evidence against petitioner.

Petitioner says said return is evasive in failing to set forth all the pleadings and proceedings in said police court, and that petitioner filed a plea to the jurisdiction of said court, which was, in substance and effect, as follows:

Title of court and cause.

Now comes Henry Christensen, who, being duly sworn, deposes and says that he is the defendant of this action.

Deponent on his oath denies the validity of the license tax imposed by order No. 1589.

Deponent says that said order is invalid, and has been so held in the McCall *vs.* Cala., 10 S. C. R. (U. S.), 880, on May 20th,

61 1890.

Deponent says that this court has no jurisdiction to proceed with this action.

HENRY CHRISTENSEN.

Subscribed and sworn to before me this 22nd of June, 1889.

JNO. J. KENNY,
Clerk of the Police Court.

I certify the above traverse to be well founded in point of law.

ALFRED CLARKE,
Att'y for Petitioner.

Service of the within admitted by copy this 22d day of Aug., 1890.

Received, this 22d day of August, 1890, a copy of the within, but objects and excepts to the filing of the same and reserves all objections and exceptions thereto.

DAVIS LOUDERBACK,
Counsel for People & Respondent.

Endorsed: Filed Aug. 23, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

62 *Judgment.*

In the Circuit Court of the United States, Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus*. No. 10817.

This matter having been regularly brought on for hearing, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the court now here considered that Henry Christensen, in whose behalf the writ of *habeas corpus* herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby, discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 4th day of September, 1890.

L. S. B. SAWYER, *Clerk.*

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of the judgment of discharge entered in the above-entitled matter.

Attest my hand and the seal of said circuit court this 4th day of September, A. D. 1890.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By —— ——, *Deputy Clerk.*

Endorsed: Filed September 4, 1890.

L. S. B. SAWYER, *Clerk.*

63 *Clerk's Certificate to Judgment-Roll.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus*. No. 10817.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled matter.

Attest my hand and the seal of said circuit court this 4th day of September, 1890.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Judgment-roll. Filed September 4th, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

64 *Affidavit of George Humphrey.*

In the Circuit Court of the U. S., Northern District, State of California.

Ex Parte CHRISTENSEN. No. 10817.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

NOW comes GEORGE HUMPHREYS, who, being duly sworn, deposes and says that he is and for 32 years last past he has been a citizen of and resident and voter in the city and county of San Francisco.

That for the last six years his business has been that of a collector and business manager, and that, among other branches of his business, he has more than fifty times solicited the signatures of property-owners for liquor dealers for the purpose of aiding them in obtaining a liquor license under order 1845.

65 That he knows the value of such services and has performed them more than fifty times.

That the reasonable compensation for obtaining the signatures of twelve property-owners in the block for the issue of a liquor license is from $50 to $100, according to the circumstances of each case.

That during the year ending June 30th, 1888, the number of license-paying liquor saloons in said city and county varied between 2,875 and 2,854.

The number of cases in which the hon. board of police commissioners granted their consent to the issue of a retail liquor dealer's license was 1,439 and no more; 37 out of said number were at first refused by said board, but afterwards granted on the signatures of twelve citizens and real property-owners in the block.

66 During said year twenty applications for consent to issue of licenses for retail liquor dealers were refused by said board and the applicants denied a license, and thus precluded from pursuing their business.

The total number of licenses issued by the license collector for said business during said year was 11,001; total sum collected therefor, $231,021.00; total of all license collections for said year, $489,128.05; total paid to city and county treasurer, $484,079.65; paid to State treasurer, $5,048.40.

GEO. HUMPHREY.

Subscribed and sworn to before me this 19th day of July, 1889.
HALE RIX,
Police Judge.

Endorsed: Filed August 18, 1890. L. S. B. Sawyer, clerk.

67 *Affidavit of Emilie Christensen.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Now comes AMELIA CHRISTENSEN, who, being duly sworn, deposes and says that she is the wife of Ole Christensen.

That she has been arrested for stealing money from Lorenzo Niblas about the 16th of April, 1889, in a saloon, 120 Montgomery avenue. Deponent solemnly swears that she is not guilty of said crime, and she has several witnesses by whom she can prove her innocence. Deponent further swears that she was too sick to go to court on May 31st, 1889.

That she is lawfully married, and that Officer Gillin's reference to her as a reputed wife is an injustice to her.

EMILIE CHRISTENSEN.

Subscribed and sworn to before me this 19th day of June, 1889.
JAMES LAWLOR,
Judge of the Police Court of said City and County.

Endorsed: Filed August 18, 1890. L. S. B. Sawyer, clerk.

68 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus.* No. 10817.

Opinion.

Arbitrary power to license liquor dealers void.—A municipal ordidinance requiring all retail liquor dealers to procure a license and making it an offense to retail without such license and at the same time forbidding any such license to be issued unless upon the arbitrary, uncontrolled, written consent of a certain designated number of persons, there being no other qualifications or conditions prescribed, violates the Constitution of the United States and is void.

69 Alfred Clarke for petitioner; Davis Louderback for respondent.

SAWYER, *Circuit Judge:*

I am always extremely desirous of avoiding any interference with the State courts in the execution of the laws, or what purport to be the laws, of the State, and do not interfere when the circumstances are such that I can find it consistent with my duty to decline action till the State courts have at least had an opportunity to act.

In *Ex parte* Royal, 117 U. S., 241, the supreme court, while holding that the circuit court had jurisdiction by writ of *habeas corpus* to take a prisoner out of the custody of the State court at any stage of the proceeding when alleged to be held in violation of the Constitution and laws of the United States and to summarily determine the case, further held that where there were no special circum-
70 stances to influence its action it had the discretion to decline to interfere till the State courts could try the case and, even after trial and conviction, till an appeal or writ of error, where an appeal or writ of error lies, could be taken to the United States Supreme Court and the constitutionalty of the law be there regularly determined in the ordinary course of judicial proceeding. This decision gave to the circuit courts and judges in such matters a much wider discretion than I had before supposed was vested in them. The petitioner in this case applied to me about a year ago for a writ of *habeas corpus* to discharge him from arrest under the same ordinance now involved in this case. Acting upon the decision in *Ex parte* Royal, I declined to issue the writ, not because I did not suppose it was otherwise a proper case for a writ, but because I saw no special circumstance in the case to require me to act at that time, and I therefore required him to go to the State courts for his
71 remedy and to pursue it, as he was entitled to do, by the regular course of proceeding — of writ of error to the U. S. Supreme Court. The only difference to him would be the channel through which he would reach the court of last resort.

I was exceedingly averse to unnecessarily putting myself in antagonism to the courts, and especially the higher courts of the State, over whose action I had no appellate jurisdiction in the ordinary course of proceedings in the administration of the laws.

He went to the State courts and, after something like a year's litigation, as the petition and record show, the ordinance now in question, under which he was held, was, by a divided court, declared to be valid not only under the constitution and laws of the State, but also that it violated no provision of the Constitution or laws
72 of the United States, and he was remanded to custody. The record further shows that after this decision the petitioner applied to the chief justice of the supreme court of the State for the allowance of a writ of error, but that the chief justice, notwithstanding the fact that the decision was rendered by a divided court, refused to allow the writ, in consequence of which action petitioner was unable to avail himself of the right guaranteed to him by the Constitution and laws of the United States, to have the question as to whether the ordinance does violate the Constitution or laws of the United States reviewed by the Supreme Court of the United States—the tribunal having the jurisdiction to ultimately and authoritatively determine the constitutionality and validity of the ordinance in this particular. The justice of the Supreme Court allotted to this circuit being absent in Europe, he cannot apply to him for an allowance of the writ, and he is now utterly with-
73 out remedy unless it can be had on this writ.

Under these circumstances I do not feel at liberty, under

the laws of the United States and under the decision in *Ex parte* Royal, to further decline to issue the writ and summarily examine the case, even though it devolves upon me in the exercise of this jurisdiction imperatively imposed upon me to review, and, however unpleasant it may be to me, if the ordinance is found to be unconstitutional, overrule the decision of the highest court of the State.

The ordinance requires that every party selling liquors at retail shall pay for and take out a "license at a specified rate," and that "after January 1, 1886, no license as a retail liquor dealer * * * shall be issued by the collector of licenses unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county
74 of San Francisco to carry on said business; but in case of a refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less that twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer * * * is to be carried on." It further makes it a misdemeanor to violate any of the provisions of the ordinance.

It also appears in the record that the petitioner tendered the amount of his license fee and requested the written consent of the majority of the police commissioners to the issue thereof, and it was refused; that there were not twelve citizens of San Francisco owning real estate in the block or square in which he desired to carry on his business as a liquor dealer, and that it was therefore impossible to obtain the assent of twelve such citizens, and that a
75 license was consequently refused; that, proceeding with his business long before established, he was again arrested for violation of said ordinance, and he is now in custody in pursuance of such arrest.

I am myself, after due consideration, unable to take the case out of the rule laid down in the second head-note to the decision in Yick Wo *v.* Hopkins and Wo Lee *v.* Hopkins, 118 U. S., 356, which reads: "A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the Constitution of the United States if it confers upon the municipal authorities arbitrary power, at their own will and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or to the propriety of place selected for the carrying on of the business."

76 In commenting upon the view of the supreme court of California that the ordinance then in question vested "in the board of supervisors a not unusual discretion in granting or witholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, in view of the protection of the public against fire," the United States Supreme Court in that case said, on page 366: "We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinance which points to such regulation of the business of keeping or conducting laundries.

They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places, but as to persons. * * * The
77 power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

The language quoted is just as applicable to this ordinance as to that then under consideration. In that ordinance it was made unlawful for "any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, &c.," and in the ordinance in this case it is made unlawful for any person to carry on the business of a liquor dealer without a license, which could only be obtained upon the "written consent of a majority of the board of police commissioners," or, in default of that, upon the "written recommendation of twelve citizens" having property in the block or square where the
78 business is desired to be carried on. What difference is there in the provisions of the two ordinances, except that the consent in the laundry ordinance is to be by the board of supervisors themselves, while in the liquor ordinance the power to consent or reject is delegated by the board of supervisors to the police commissioners or to twelve citizens of the block? If the board of supervisors could not confer upon or reserve to itself this unregulated, arbitrary power, it certainly could not confer it upon the police commissioners or upon private parties, having no official relations whatever to the subject-matter.

In the case of Wo Lee, 11 Saw., 429, this court differed from the State supreme court upon the same point decided in Yick Wo *v.* Hopkins and gave its reasons for so doing at length, but, in deference to the decisions of the supreme court of California, it yielded
79 its own convictions and remanded the petitioner, thinking it better that the question between the State and the national courts should be authoritatively settled by the U. S. Supreme Court on appeal than to bring these subordinate courts into antagonism. The result was both cases went to the Supreme Court of the United States. That court quoted largely from the opinion of this court and approved its views. It consequently reversed the judgment of the circuit court, as it did of the supreme court of California, which this court had followed. Yick Wo *v.* Hopkins, 118 U. S., 356. The decision of Justice Field in the laundry ordinance case, 7 Saw., 531, is also in point and to the same effect. See *In re* Wo Lee, 11 Saw., 429.

It is sought by counsel for the city, as was attempted by the State supreme court, to distinguish this case from the laundry ordinance case cited on the ground that the laundry business is a necessary business and cannot be wholly suppressed, but only regulated, for the purposes of securing safety from fires, while selling liquors is supposed to be injurious to society *per se*, and may be wholly
80 prohibited or permitted upon such conditions as may be pre-

scribed; that the power to absolutely prohibit necessarily includes the power to impose any terms or conditions, however arbitrary, no matter what, less than absolute prohibition, and consequently that the power to grant or refuse a license may be delegated to the arbitrary and unregulated will of one or more persons, official or unofficial. I cannot, as at present advised, assent to this proposition. This ordinance does not limit or regulate or purport to limit or regulate the sale of liquors. It would seem to be upon its face—like other license ordinances—a mere revenue measure. It does not prohibit the sale of liquors or limit their sale to any particular portion of the city or to any number of persons, nor prescribe any qualifications whatever which shall be necessary to entitle a party to a license or prescribe any conditions or characteristics which shall constitute a disqualification and debar one from
81 obtaining a license. It is not a matter of regulation at all. It simply provides that no license shall issue to any party unless he obtains the written consent of a majority of police commissioners or of twelve property-holders in the same block without indicating any conditions whatever upon which the assent may or ought to be given or withheld. It leaves it to the absolute, arbitrary, unregulated will of the persons named. They can consent to grant a license to every vagabond and disreputable person in the city and refuse to consent to a license to every respectable person in the city. The ordinance permits and authorizes such action. It puts it in the absolute, arbitrary power of these persons to control the whole retail liquor trade of the city without regard to qualifications of the parties seeking a license or to circumstances or conditions or the interests of society. In my judgment, an ordinance that upon its face permits and authorizes such discrimination and inequality of
82 operation is a violation of the Constitution of the United States. I admit the full power of the State to prohibit, limit, and control the domestic liquor traffic and to prescribe the qualifications and conditions applicable to all of those who are to be permitted to sell liquors, but this is a very different proposition from that which claims the authority to confer upon any one or more persons the arbitrary power, in accordance with their uncontrolled will, to regulate these matters. It is not unlawful to deal in liquors or sell liquors at retail in California or San Francisco any more than it is to keep a laundry, which business also pays a license. The record shows that there are between 3,000 and 4,000 licensed retail liquor dealers in San Francisco. It is only made unlawful to sell liquors when you cannot obtain the written consent of a certain number of men whose action in yielding or withholding their consent is influenced by no qualifications or consideration other than their own arbitrary will, governed, perhaps, by prejudice or other unworthy motives, and that was one of the grounds upon which the laundry ordinance under consideration was expressly and directly held by the Supreme Court of the United States to be unconstitutional. The police powers are the powers which come into play in the licensing and regulating of both occupations, and in both instances they oper-

ate upon the same legal principles and they should have a similar, equal, and uniform application.

Under this ordinance the police commissioners, for anything in its provisions to restrain them, might consent to the license as retail liquor dealers of every immoral person in the city, while consent might be withheld from every person who is respectable and suitable for the business. If they do not do this it is not because they are restrained by any provisions of the ordinance. Those provisions permit it.

83 In the case of the laundry ordinance cited it appeared, it is true, that the gross discriminations which the ordinance permitted were in fact made in its administration. These arrests for such gross discriminations were doubtless illegal on that ground also, but the discriminations in fact made cannot affect the validity of the ordinance itself. The ordinance was declared void because it permitted a discrimination, not merely because its permission was, in fact, made available in practice. The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is, in fact, administered. Its capability of being abused is the test.

In the case of the ordinance in question no evidence was introduced as to the way in which it has been, in fact, administered, but the case was argued and submitted and decided solely upon the character, terms, and provisions of the ordinance itself as they appeared upon the face of the ordinance.

84 But the mode of its administration would be irrelevant to the point decided, as the question is as to the validity of the ordinance itself as it appears upon its face, and not whether it has been honestly or dishonestly administered. The fact that it permits arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications whatever other than the unregulated, arbitrary will of certain designated persons, is the touchstone by which its validity is to be tested. That there are likely to be abuses, as in the case of the laundry ordinance, both as to individuals and classes, there is no reason to doubt when an outburst of popular prejudice shall demand or countenance it, and it is also liable to be abused from more unworthy motives, considerations, and influences. The ordinance should prescribe some conditions, qualifications, or disqualifications by which those who are to issue licenses are to be guided in their action other than their own unregulated, arbitrary wills.

85 After careful consideration I am unable to take this ordinance out of the rule laid down in the second head-note in Yick Wo *v.* Hopkins and Wo Lee *v.* Hopkins, 118 U. S., 356. As that decision is controlling, so far as this court is concerned, I am bound to discharge the petitioner, however willing I might otherwise be to yield my individual views to the judgment of the supreme court of the State.

Let the petitioner be discharged.

Should the city desire to appeal to the Supreme Court of the

United States an appeal will be gladly granted. The question has reached such a station that it is of the utmost importance that it be authoritatively decided. Until so decided the foregoing views will continue to control the action of this court.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge.

Endorsed: Read in open court September 4th, 1890. L. S. B. Sawyer, clerk.

86 At a stated term, to wit, the July term, A. D. 1890, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 4th day of September, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Discharging Petitioner and Allowing Appeal, &c.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus*. No. 10817.

Counsel for petitioner and respondent present.

Opinion read by the court.

The above-entitled matter having been, after argument by the respective counsel, submitted to the court upon the exceptions
87 on demurrer of petitioner to the return of respondent herein, and it appearing from the return that the petitioner is in custody in violation of the Constitution of the United States, it is therefore ordered that the petitioner be, and he is hereby, discharged from custody.

Thereupon, on motion of Davis Louderback, attorney and counsel for respondent herein, to wit, P. Crowley, chief of police of the city and county of San Francisco, State of California, it is further ordered that an appeal from the foregoing decision and order discharging Henry Christensen, the petitioner herein, be, and the same is hereby, allowed, and that the record upon such an appeal shall consist of the original citation herein and a transcript of the following papers on file in this matter, to wit, the petition or complaint in writing for the issuance of the writ of *habeas corpus;* the writ of *habeas corpus*
88 issued thereon and the return thereto of the respondent, as the chief of police of the city and county of San Francisco, and the petitioner's exceptions to said return and the traverse to the return and the affidavit of George Humphrey and Emilie Christensen; this order and the whole thereof and the judgment entered thereon; the bond for costs on appeal, and the opinion of the court discharging the petitioner.

It is further ordered that a bond on appeal, in the usual form, for costs be given by said respondent in the sum of five hundred dollars, to be approved by the judge of said circuit court.

It is further ordered that pending said appeal and until the final determination thereof by said Supreme Court of the United States

said Henry Christensen, the petitioner herein, be discharged upon due execution by him of his own recognizance, in the sum of five hundred dollars, in all matters to abide and hold himself to answer the final decision and judgment of said Supreme Court of the United States herein.

Bond on Appeal.

89 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Northern District of California.

In Re HENRY CHRISTENSEN on *Habeas Corpus.*

Know all men by these presents that I, P. Crowley, as principal, and T. D. McKenna and W. E. Hall, as sureties, are held and firmly bound unto Henry Christensen, the above-named petitioner, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Henry Christensen, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 10th day of September,
90 one thousand eight hundred and ninety.

Whereas the respondent herein, P. Crowley, as chief of police of the city and county of San Francisco, State of California, has taken his appeal to the Supreme Court of the United States to reverse the final decision and judgment rendered and ordered in the above-entitled cause by the above-named circuit court:

Now, therefore, the condition of the above obligation is such that if the said respondent shall prosecute his said appeal to effect and answer all costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

P. CROWLEY. [SEAL.]
T. D. McKENNA. [SEAL.]
W. E. HALL. [SEAL.]

Acknowledged & signed, sealed and delivered, in the presence of—
L. S. B. SAWYER,
Com'r U. S. Circuit Court, Nor. Dist. Cal.

91 UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } *ss:*

T. D. McKENNA and W. E. HALL, the sureties to the foregoing bond, being first duly sworn, depose and say, each for himself, that he is a freeholder in said city and county of San Francisco; that he is worth the sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

T. D. McKENNA.
W. E. HALL.

Subscribed and sworn to before me this 10th day of September, 1890.

L. S. B. SAWYER,
Com'r U. S. Cir't Court.

Endorsed: The within bond is approved this 10th day of September, 1890. (Signed) Lorenzo Sawyer, circuit judge. Filed September 10, 1890. L. S. B. Sawyer, clerk.

92 *Recognizance to Appear Pending Appeal*

Appellee's recognizance pending appeal.

UNITED STATES OF AMERICA, *Northern District of California*, } ss:

Be it remembered that on this 12th day of September, 1890, before the undersigned, a commissioner, duly appointed by the circuit court of the United States, northern district of California, to take acknowledgement of bail and affidavits, etc., personally appeared Henry Christensen and acknowledged himself to owe and be indebted to the United States of America as follows—that is to say, in the sum of five hundred dollars, to be levied of his goods and chattels, lands and tenements, and the United States rendered if default be made in the conditions following:

The conditions of this recognizance are such that whereas the said Henry Christensen has been produced before the circuit court of the United States in and for the northern district of California upon a writ of *habeas corpus*, duly sued out of said court upon petition, and has been duly admitted to bail by said court pending the final determination of said petition and writ by the Supreme Court of the United States in the sum of five hundred dollars:

Now, therefore, if the said Henry Christensen shall personally appear before the said circuit court of the United States in and for the northern district of California, at the court-room thereof, at San Francisco, California, as he may, from time to time, be by said court required to appear and render himself amenable to any and all lawful orders and process of said court, and not depart the said court without leave first obtained, and abide by the final order of said court in said matter to be made and entered, then this recog-
93 nizance shall be void; otherwise to remain in full effect and virtue.

HENRY CHRISTENSEN.

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

Endorsed: Filed Sept. 12, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

94 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Northern District of California.

In the Matter of HENRY CHRISTENSEN on *Habeas Corpus*. No. 10817.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, hereby certify that the foregoing ninety-three written and printed pages, numbered from 1 to 93, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled matter, and that the same together constitute the transcript on appeal to the Supreme Court of the United States therein.

Seal U. S. Circuit Court, Northern Dist. Cal.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 14th day of September, A. D. 1890.

L. S. B. SAWYER, *Clerk.*

95 UNITED STATES OF AMERICA, *ss:*

To Henry Christensen, appellee, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1890, pursuant to an appeal duly sued out and allowed on the 4th day of September, A. D. 1890, by the circuit court of the United States, 9th circuit, northern district of California, to P. Crowley, chief of police of the city and county of San Francisco, State of California, respondent, in the matter and cause of you, the said Henry Christensen, on *habeas corpus*, and from the final decision and judgment of said circuit court discharging you from custody in said matter and cause, rendered, made, and entered on said 4th day of September, 1890, and in which said appeal you are the appellee, to show cause, if any there be, why the said decision and judgment of said circuit court in the said matter and cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, circuit judge of the United States of the 9th judicial circuit in and for the northern district of California, this 10th day of September, A. D. 1890, and of the Independence of the United States the one hundred and fifteenth.

LORENZO SAWYER,
U. S. Circuit Judge.

96 [Endorsed:] 10817. In the Supreme Court of the United States. *In re* Henry Christensen on *habeas corpus.* Citation. Service of the within citation per copy hereof admitted this 10th day of September, 1890. Alfred Clarke, attorney for appellee. Filed September 10, 1890. L. S. B. Sawyer, clerk.

Endorsed on cover: N. California C. C. U. S. No. 1317. P. Crowley, chief of police of the city and county of San Francisco, State of California, appellant, *vs.* Henry Christensen. Filed September 27, 1890.

FILED,
OCT 23 1890
JAMES H. McKENNEY,
CLERK.

No. 1317.

OCTOBER TERM, 1890.

SUPREME COURT

—OF THE—

UNITED STATES.

P. CROWLEY,

(Chief of Police of the City and County of San Francisco, State of California),

Appellant.

VS.

HENRY CHRISTENSEN,

Appellee.

APPEAL FROM THE CIRCUIT COURT

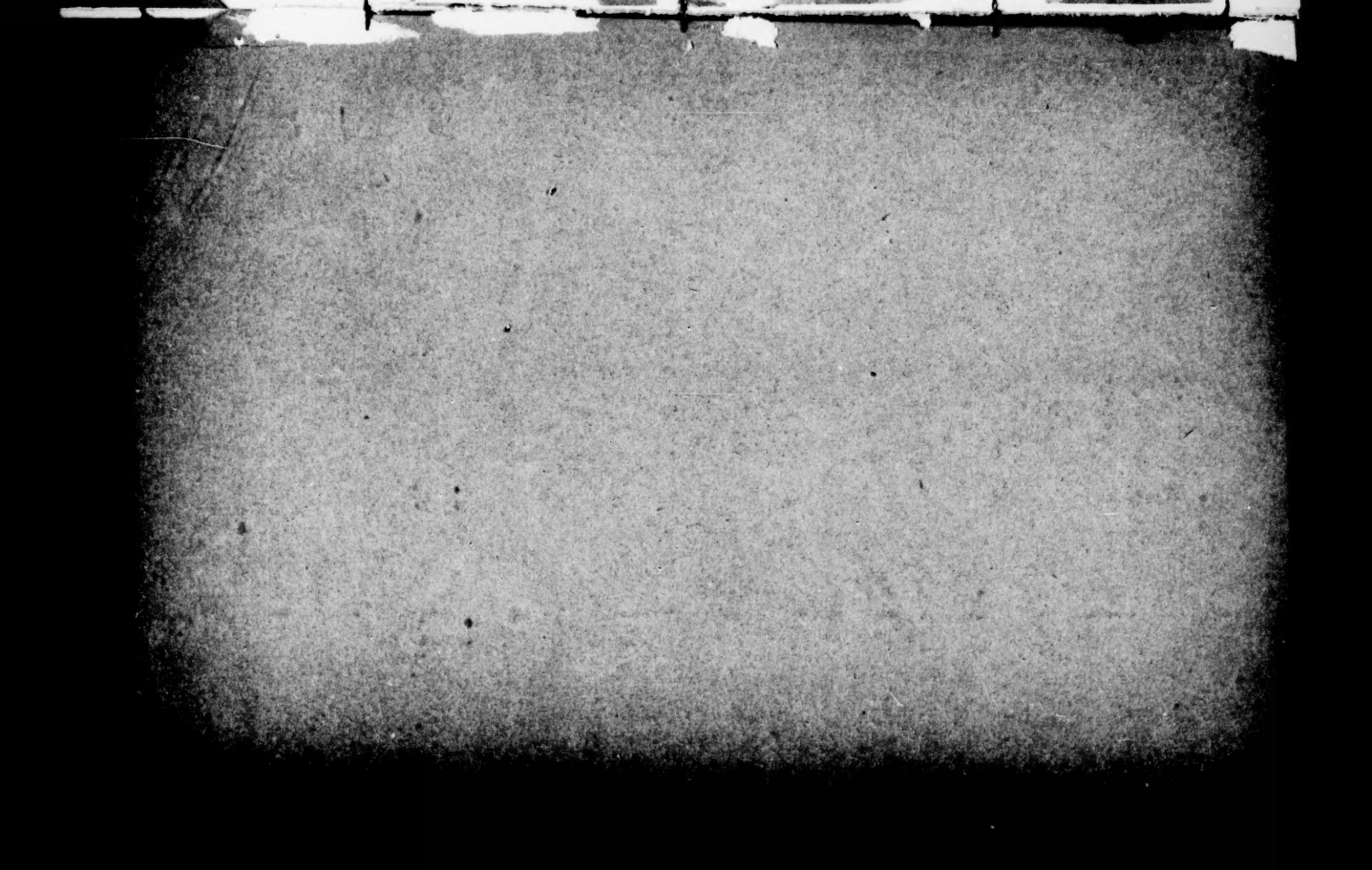
Of the United States, for the Northern District of California.

DAVIS LOUDERBACK,
Counsel for Appellant.

Filed ..... *day of October, 1890.*

Clerk.

By ..... *Deputy Clerk.*



IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1890.

No. 1317.

P. CROWLEY, CHIEF OF POLICE OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA,
Appellant,

vs.

HENRY CHRISTENSEN.
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of California.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

Henry Christensen was detained by the Chief of Police of the City and County of San Fran-

cisco under a warrant of arrest issued by the Police Court of the City and County of San Francisco, upon the charge of having engaged in and carried on the business of selling spiritous, malt and fermented liquors and wines in less quantities than one quart, without the license required by ordinance of the City and County of San Francisco.

The ordinance is No. 1589, approved July 28, 1880. The first part, and Sections 1 and 2 of the order are as follows:

ORDER No. 1589.

IMPOSING MUNICIPAL LICENSES.

The People of the City and County of San Francisco do ordain as follows:

[PENALTY.]

SECTION 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not more than one thousand dollars, or by imprisonment no more than six months, or by both.

MUNICIPAL LICENSE.

SECTION 2. It shall be unlawful for any person to engage in or carry on any business, trade, profession or calling, for the transaction or car-

rying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession or calling.

Section 7, which provides that liquor licenses shall be issued for three months only, reads:

DATE OF LICENSE.

SECTION 7. All licenses for owners, keepers and drivers of vehicles and hackney carriages, and owners and keepers of boats, shall date from the first day of January or July of each year, and shall be issued for one year from either of the aforesaid dates.

All licenses for vehicles shall date from the first day of January or July of each year, and shall be issued for one year from either of the aforesaid dates.

All licenses for drivers of hackney carriages and boatmen shall date from July of each year, and shall be issued for one year from the aforesaid date.

Licenses on all dogs shall expire on the first day of July of each year, and shall be issued for one year from the aforesaid date.

All licenses for street railroad passenger cars, insurance companies, runners and solicitors, peddlers of produce, fish, fruit, game, vegetables and merchandise from baskets or wagons shall date from the first day of January, April, July or Oc-

tober of each year, and shall be issued for the term of three months; provided an application for the first time, and said application being made after the first day of the last month of the aforesaid quarter, then the collector of licenses may issue a license to the end of the succeeding quarter from the date of issuance.

All licenses for theatres, concert halls, places of amusement, entertainments or exhibitions, may be issued for the period of one year, for three months, for one month, and for one day.

All other licenses shall be issued for *the period of three months* to date from the expiration of the last license or from the date that the applicant shall have commenced business for which a license shall be required.

Subdivision XXXIX of Section 10 as amended by Order No. 1845, approved Janury 19, 1886, reads:

RETAIL DEALERS' LICENSE.

XXXIX. Every person who sells spiritous or malt or fermented liquors or wines in less quantities than one quart shall be designated as a "retail liquor dealer," and as a "grocery and retail liquor dealer," and shall pay license as follows:

First—Those making sales to the amount of fifteen thousand dollars and over per quarter, shall pay a license of forty-one dollars per quarter.

Second—Those making sales of less than fifteen thousand dollars per quarter shall pay a license of twenty-one dollars per quarter; *provided*, that on and after January 1, 1886, no license as a "retail liquor dealer," or as a "grocer and retail liquor dealer," shall be issued by the Collector of Licenses, *unless the person desiring the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the City and County of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of "retail liquor dealer," or "grocery and retail liquor dealer" is to be carried on.* All licenses issued under this Section shall be known and designated as "retail liquor dealer," and "grocery and retail liquor dealer," license.

Third—Every person who sells cider, sarsaparilla, ginger pop or soda or mineral water, except from a fountain, in quantities of less than one quart, shall, in addition to the license required to be paid, be subject to the conditions and provisions contained in subdivision three of this Section. No license shall be required by physicians,

surgeons or apothecaries, or chemists, for any wines or spiritous liquors they may use in the preparation of medicines, or which may be dispensed by them for medicinal purposes; *provided*, however, that the same shall not be sold by the glass or consumed on the premises of the vendor.

Fourth—Every person violating any of the provisions of this Section, or falsely representing himself as being a citizen of San Francisco, and owning real estate in the block or square therein specified, shall be guilty of a misdemeanor.

Sections 4 and 5 of said order are as follows:

TRIAL OF CRIMINAL ACTION—PRODUCTION OF LICENSES.

SECTION 4. Upon the trial of any criminal action, brought under or arising from any provision or provisions of this Order, the defendant shall be deemed not to have procured the municipal license required for the current time, unless he or she either produces the same or proves having paid for the same to the proper officer.

EVIDENCE OF LIABILITY OF PARTY TO PAY LICENSE.

SECTION 5. In any action brought under or arising out of any of the provisions of this order, the fact that a party thereto representing himself or herself as engaged in any business or calling, for the transaction of which a license is by this order required, or that such party exhibited a

sign indicating such business or calling, shall be conclusive evidence of the liability of such party to pay for a license.

Sections 435 and 19 of the Penal Code of the State of California read:

"435. Every person who commences or carries on any business, trade, profession, or calling for the transaction or carrying on of which a license is required by any law of this State, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor."

"Section 19. Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

CONSTITUTION.

Section 11 of Article XI of the Constitution of the State of California, which Constitution was adopted by the people May 7, 1879, is as follows:

"§ 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Licenses for persons to engage in or carry on the business of the sale of spiritous or malt or

fermented liquors or wines in quantities less than one quart, in said City and County of San Francisco, as required by said Orders Nos. 1589 and 1845, are issued as provided therein for *three months only*, that is from a certain date to a certain date, covering a period of three months, and each expire at the end of that period.

To *each* and *every issue* of such *quarterly* license the written consent of a majority of the Board of Police Commissioners of said city and county to carry on or conduct such business is required. In those cases where the said Police Commissioners have given such consent to a quarterly license, it is the understanding and practice between said Board of Police Commissioners and the License Collector of said city and county, who under said Orders Nos. 1589 and 1845, issue such license, for the License Collector to presume that the consent of said Board of Police Commissioners is thereafter given to each *subsequent* issue of a license to the same person for the same place, unless said License Collector is notified by said Board of Police Commissioners that the consent is withdrawn. In case of the withdrawal of said consent from a person having such an existing license the withdrawal is not as to that *existing* license, but the holder thereof, notwithstanding the said withdrawal, is considered to have the right and is per-

mitted to carry on such business under said existing license till said license expires, and the withdrawal of such consent is as to any future license that may be applied for by the same person; that when the consent is withdrawn the said License Collector and the party holding the license are immediately notified thereof and thus afforded an opportunity to apply to said Board of Police Commissioners for such consent, or apply to said Board for a hearing in regard to the matter which is accorded by said Board of Police Commissioners, or to obtain the written recommendation of twelve citizens of San Francisco owning real estate in the block or square in which the business is or is to be carried on. That said Board withdraws consent in those cases where it has reason or probable cause to believe that the business is not carried on or conducted in a manner consistent with the interests and objects of good government and the laws, that is, where the place of business is a disorderly place, or a place of crime, or a nuisance to the neighborhood, or a resort of drunkards, criminals, thieves or vagrants, or is conducted so as to be violative of the criminal laws and the rights of others. That said Harry Christensen applied on December 17, 1888, to said Board of Police Commissioners for their consent to the issue to him of a retail liquor dealers' license, to carry

on such business on the northeast corner of Jackson and Kearny streets, in said city and county, under said Orders Nos. 1845 and 1589, and said consent was granted and thereupon he obtained such license from the said License Collector for the three months, that is from December 17, 1888, to March 17, 1889. That when said license was about to expire he obtained from the said License Collector another such license for three months, that is, from March 17, 1889, to June 17, 1889, and the said License Collector issued the same upon the *presumed* consent and understanding as aforesaid. That since said license expired on June 17, 1889, said Christensen has not had any license under said Orders or any license whatever to carry on such business. That on the 10th day of June, 1889, the said Board of Police Commissioners upon the report of a Captain of Police, relative to the liquor saloon carried on by said Christensen, under said last license, and which report was unfavorable thereto, and said Board having reason to believe the business and place was carried on in such a manner as to be offensive and violative of the criminal laws and the rights of others, withdrew their said consent and all the said Police Commissioners withdrew their consent heretofore given, and on June 11, 1889, in said city and county, notified said Christensen of said

withdrawal of said consent, and also on the same day notified said License Collector of said withdrawal. That among other things said Christensen has always been in carrying on said business and liquor saloon and is assisted by Amelia Christensen, whom he represents and claims to be his wife. That on the 8th day of April, 1889, one Lorenzo Neiblas was a visitor to said liquor saloon, carried on by said Christensen and said Amelia Christensen was assisting therein. That said Amelia Christensen, on said April 8, 1889, in said city and county, feloniously, wilfully and unlawfully, stole, took and carried away from said Neiblas the sum of one hundred and sixty dollars, in lawful current gold coin of the United States, of the moneys of said Neiblas. That afterwards said Amelia was duly arrested for said offense and examined in said city and county upon said charge of stealing said money, before H. L. Joachimsen, a Police Judge of said city and county, and held by said judge to answer the said charge of grand larceny in feloniously stealing, etc., said money. That afterwards, to-wit, on October 10, 1889, she was convicted of said offense in the Superior Court of said city and county, and on November 11 1889, said Superior Court rendered its judgment therein and sentenced her to imprisonment in the House of Correction of said city and county for

the term of one year. That she has appealed and has been released from custody on bail pending the appeal. That on July 7, 1889, in said city and county, and in said liquor saloon, carried on by said Harry Christensen, one Ivers Weden and one Gus Anderson feloniously stole, took and carried away from one Peter Anderson, one watch and one scarf pin of a value exceeding fifty dollars and of the personal property of Peter Anderson. That said Weden and Gus Anderson were arrested therefor and examined on said charge before a Police Judge of said city and county, and by said judge on July 9, 1889, held to answer on said charge of grand larceny for feloniously stealing, etc., said watch and scarf pin.

That on June 19, 1889, said Harry Christensen filed a petition with said Board of Police Commissioners, representing, among other things, that Amelia Christensen was his wife and was innocent of the said charge of grand larceny and requesting "that he be allowed to carry on his business on probation until his wife has her trial," and also requesting a hearing by the Board before the Board decides to refuse a license.

That said Board decided to give him a hearing in the matter.

That said Board met on June 24, 1889, and that the said Board generally holds weekly meet-

ings, and since then there has been many meetings of the said Board, and said Christensen or his attorney have not appeared before the Board to proceed with the hearing. On the 8th day of July, 1889, he filed with the said Board a writen communication, and stated therein, among other things, that he had been arrested and that he had applied for a writ (meaning, it is presumed, a writ of habeas corpus before the Supreme Court of the State of California) and suggesting to said Board that the matter lie on the table until after the Court disposes of his case and then he would offer his witnesses.

That he has ever since June 17, 1889, the time his last license expired, carried on and is carrying on said business without any license, in violation of said orders and the laws of said State.

That he has not at any time presented to said Board of Police Commissioners any recommendation of any citizens, as provided by said order, or any recommendation whatever.

The Board of Police Commissioners do not and have not *revoked* or annulled any license. Every person is permitted to carry on business during the life of the license he may have. The Police Commissioners do, however, exercise their conscientious judgment and refuse their consent to a quarterly license, when they deem it their official duty

to do so. As they do not 'annul or *revoke* a license,' there is no such thing as a *hearing*, or *notice* for that purpose. No question of revocation or annulment, or manner of revocation or annulment, is involved in this case. The Commissioners will accord a hearing as to the granting or refusal of their consent to a quarterly license. The citizens in the block or square, as provided in the Ordinance, are the final arbitrators in the matter.

If they give their recommendation as provided in the Ordinances, the law is mandatory and the Commissioners forthwith in compliance with the recommendation, give their consent.

Christensen had the *written* consent of the Commissioners for a license from December 17, 1888, to March 17, 1889. He had their *presumed* consent for a license from March 17, 1889, to June 17, 1889. Since June 17, 1889, he has not had their written consent nor their *presumed* or any consent. From June 10th, the time of the withdrawal of presumed consent as to future licenses till June 17th, when his license expired, he did not apply for consent or present recommendation of citizens and has not since. He is, and since then has, however, in violation of the Ordinances carried on the business without license. The date of the offense as set forth in the complaint is June

20, 1889. The complaint was sworn to on June 21, 1889, and the warrant issued the same day.

On or about June 13, 1889, Henry Christensen tendered to the said License Collector the sum of twenty-one dollars in U. S. gold coin, and the License Collector refused to issue to him a quarterly license as a retail liquor dealer to carry on such business at said place for the quarter or three months after June 17, 1889, for the reason that he had not the consent of a majority of the said Police Commissioners to the issue of the same.

There were and are more than sixteen citizens of San Francisco owning real estate in the block or square in which said business of said Christensen has been and is carried on, although said Christensen alleges in effect that there are less than twelve.

On June 28, 1889, Christensen sued out a writ of habeas corpus before the Supreme Court of the State of California and was released on bail by said Supreme Court, pending the hearing of its habeas corpus.

He made the same allegations of facts and the same objections to the passage, enactment, publication and validity and constitutionality of said orders of said Board of Supervisors and said detention under said warrant and to the jurisdiction of the Police Court, and to the withdrawal or withhold-

ing of consent by the Police Commissioners as he has done in his proceedings before the Circuit Court of the United States for the Ninth Circuit, Northern District of California, in this matter from which this appeal is taken.

The matter was submitted to the Supreme Court of California on briefs to be filed. The judges, owing to the great pressure of their judicial business, were not able to read the briefs within the time required by the law, and with the *consent of the respective parties* proper proceedings were had and the time extended, and the Court from the great pressure of its business, did not render its decision till August 2, 1890, when the Court in Bank rendered the following decision:

In the Supreme Court of the State of California.

IN BANK.

[Filed Aug. 2, 1890.]

THE COURT.

EX PARTE CHRISTENSEN ON HABEAS CORPUS. } No. 20,563.

The petitioner was arrested upon a charge of misdemeanor, consisting in the carrying on of the business of a retail liquor dealer in the city of San Francisco, without a license.

He contends that the ordinance prescribing the license is void for various reasons:

1. The original order, numbered 1,589, was passed in 1880. In 1886 subdivision 39 of Section 10 of this order (which relates to liquor licenses) was amended by order 1,845, and it is contended that this amendatory order was not properly passed and published in accordance with the provisions of the County Government Act.

But we do not think that the provisions of the County Government Act apply to the passage and publication of ordinances of the City and County of San Francisco.

It is argued, however, that even under the provisions of the Consolidation Act the order was not properly passed. The main point seems to be that the amendatory order only, and not the original order, was published. But there is no merit in this position. Section 68 of the Consolidation Act provides that "Every ordinance or resolution, etc., shall after its introduction in the Board be published," etc. This only requires the ordinance or resolution itself to be published. It does not require the republication of the ordinance or resolution which is amended or affected. Order No. 1,845 was a separate order and was complete in itself and, in our judgment, it was sufficient to publish it only without republishing the original

ordinance. In other respects it was properly passed.

2. It is urged that the order is in conflict with the general laws of the State.

The order provides for the payment of a specified license fee, and declares that violation of the order shall be a misdemeanor and shall be punishable by a fine of not more than $1,000, or imprisonment not more than six months, or both. The latest general law on the subject is Section 435 of the Penal Code, which is as follows:

"Every person who commences or carries on any business, trade, or profession, or calling, for the transaction or carrying on of which a license is required by any law of this State, without taking out or procuring the license prescribed by such law is guilty of misdemeanor." And the punishment of misdemeanors not otherwise provided is imprisonment for not more than six months, or a fine not exceeding $500, or both. (Penal Code, Sec. 19.)

It is argued that these two provisions are in conflict, and *In re* Sic (73 Cal., 143) is cited.

In the case of Lawrence (68 Cal., 611) it was held that the words "by any law of the State" included a municipal ordinance. In this view it must be admitted that the punishment provided by the ordinance conflicts with the *punishment*

provided by the statute. But there is no other conflict between the two provisions. There is no conflict as to what the offense is. The provision of the Penal Code simply provides that whoever transacts certain business without a license shall be punished in a certain way. It does not purport to fix the license fee or provide for its issuance. For that it refers to other laws. Therefore, the other laws cannot be in conflict with the Code in so far as it fixes the fee or provides for the issuance of the license. It is only in conflict with the Code so far as it attempts to prescribe the punishment. This latter, however, may be discarded entirely without affecting the provision that the business shall be licensed in a certain way. If, for example, the order provided no punishment whatever for doing business without a license, but merely provided what the license should be, it would be valid, and the statute would supplement it by making the failure to comply with the order a crime, and providing the penalty. The portion of the ordinance prescribing the penalty may, therefore, be rejected, and the portion of the ordinance providing for the license may stand. For nothing is better settled than that if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected.

The case of Sic is not like that before us. There the law did not refer or relate to the ordinance, but each provision was complete in itself, and provided for the punishment of the same act, and the objection was that if both were valid a man might be punished twice for the same offense. Nothing of the kind could happen under the provisions under consideration here.

The complaint is not insufficient under this view. It states the fact that the petitioner was doing business without the requisite license; refers to the original order and to the amendatory order by number, and concludes that his acts are "contrary to the form, force and effect *of the statute* in such cases," etc.

It is further argued that the provisions of the order are in conflict with the provisions of the Code of Civil Procedure in relation to evidence. This seems to be based upon the fact that the order makes certain provisions in relation to the burden of proof, and as to the effect of certain acts as evidence. It may be considered that the Board has no power to establish rules of evidence for the guidance of courts. But the prisoner has not yet been tried, and it cannot be presumed that the Court which is to try him will fall into error. These portions of the order are distinctly severable from the others, and consequently may be rejected without affecting the remainder.

3. It is argued that the order is in violation of the provisions of the Federal Constitution. This seems to be based upon the fact that the issuance of the license is made to depend upon the permission of a majority of the Board of Police Commissioners, or, if that cannot be obtained, upon the approval of twelve property-owners in the block in which the business is carried on. The language of the order on this point is as follows:

"No license as a retail liquor dealer or as a grocer and retail liquor dealer shall be issued by the Collector of Licenses unless the person desirnig the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the City and County of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on."

The objection is that this makes the license depend upon the arbitrary will and pleasure of the Board of Police Commissioners in the first instance and of the twelve property-owners in the second, and the case of Yick Wo vs. Hopkins (118

U. S., 356) and other cases from the Federal courts are cited.

But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether—provided only that it does not interfere with interstate commerce. (See Mugler vs Kansas, 123 U. S.) And if the governing power can prohibit a thing altogether it can impose such conditions upon its existence as it pleases.

There is no ground for raising the question of interstate commerce in this case, and, therefore, even if it be conceded that the conditions were arbitrary, they were within the power of the Board.

The learned counsel in a supplemental communication calls attention to the fact that the Supreme Court of the United States has just held Subdivision 33 of Section 10 of the same ordinance to be invalid. We presume that the decision proceeded upon the ground of interstate commerce. But that subdivision may be stricken out and the rest of the order may stand.

The petitioner had been doing business under a

license, and it is contended that he was entitled to notice of its withdrawal. But under the ordinance a license of this character could be granted for three months only. The petitioner's license expired on June 17th, and was not renewed. The complaint against him was filed June 20th. It thus appears that it was not the case of the revocation of an existing license, but of the refusal to issue a new license after a previous one had expired. In such a case we do not think that notice to the petitioner was necessary.

Various other points are made, but we do not think there is any merit in any of them.

The prisoner is remanded to the custody of the Chief of Police.

I dissent: McFarland, J.

The Supreme Court of California consists of seven justices; six concurred in the opinion. Justice McFarland dissented, but did not file or write a dissenting opinion, but we are permitted by the justice to state that he did not dissent on any of the Federal questions involved.

On August 4, 1890, the attorney of Christensen made an *ex-parte* application to the Chief Justice of said Supreme Court of California to sign a citation for the purpose of a writ of error, returnable before the Supreme Court of the United States to review said judgment of said Supreme

Court of California. The Chief Justice refused to sign any citation or allow any writ of error, being of opinion that it had been the settled law under the decisions of the Supreme Court of the United States for nearly half a century that the matter appertained to the police power of a State.

During all the time since the issue of said writ of habeas corpus by the Supreme Court of the State of California, that is since June 28, 1889, till the decision and judgment of said Supreme Court of California on August 2, 1890, and up to August 4, 1890, said Henry Christensen was not arrested upon any charge of carrying on the business of selling liquors without the license required by said orders of the said Board of Supervisors on account of the pendency of said proceedings before said Supreme Court of California; that from said June 28, 1890, said Henry Christensen has continued to violate and is violating the law by carrying on the said business at said place without license as required by said order of said Board of Supervisors; that after the said decision and judgment of said Supreme Court of California, said Henry Christensen, still refusing to obey the law, complaints were duly made on August 5th, 6th and 7th, 1890, by C. F. Castor, L. Webster and John F. Stewart, respectively, before said Police Court, charging said Henry Christensen respec-

tively with carrying on in the said city and county said business without the license required by said orders on August 4, 5 and 6, 1890, and he was duly arrested on warrants duly issued upon said complaints for said offenses; that on the 11th day of August, 1890, he surrendered himself to the said Chief of Police upon the charge that was the subject matter of consideration before said Supreme Court of California on habeas corpus; that is, he surrendered himself into custody under the warrant issued June 21, 1889.

That under the circumstances, and by the laws of the State of California, the offenses respectively charged in all said complaints are separate and distinct offenses.

He tendered, on September 16, 1889, to said License Collector, $21 for such a liquor license, for the three months commencing September 17, 1889, and on December 17, 1889, $21 for the three months commencing December 17, 1889, and on March 15, 1890, $21 for the three months commencing March 17, 1890.

The License Collector refused in each instance of such tender to issue a license, because Christensen did not have the consent of a majority of the Board of Police Commissioners as required by said Order, or at all.

For a full statement of all facts herein see re-

turn to writ of habeas corpus in transcript herein; p. 10, etc.

On August 11, 1890, he sued out a writ of habeas corpus before the said Circuit Court of the United States for the Ninth Circuit, Northern District of California, and was released on bail pending the hearing of the same. This matter was argued and submitted to the Circuit Court upon the exceptions or demurrer of the petitioner to the return of the Chief of Police to the writ. See Transcript, page 44, folio 87; but the transcript should read: exceptions *or* demurrer, instead of exceptions *on* demurrer.

No evidence, oral or documentary, and no affidavits or testimony were produced, read, given or heard before or to the Circuit Court in this matter. See Transcript, page 44, folio 87.

On September 4, 1890, the Circuit Court rendered its opinion and decision, holding the Ordinance invalid, and discharged the petitioner, and allowed an appeal to the Supreme Court of the United States.

In its opinion the Circuit Court says: "It also "appears in the record that the petitioner ten- "dered the amount of his license fee and requested "the written consent of the majority of the Police "Commissioners to the issue thereof and it was "refused; that there were not twelve citizens of

"San Francisco owning real estate in the block "or square in which he desired to carry on his "business as a liquor dealer, and that it was "therefore impossible to obtain the assent of "twelve such citizens, and that a license was con- "sequently refused; that proceeding with his "business long before established, he was again "arrested for violation of said ordinance, and he is "now in custody in pursuance of such arrest."

No evidence whatever was presented to the Court in this matter. It was heard and submitted on the exceptions or demurrer to the return to the writ, and therefore the facts stated in the return by the Chief of Police, the allegations and denials of the return are or should be assumed to be true in said Circuit Court and for the purposes of this appeal. It appears from the return that there were and are more than sixteen citizens of San Francisco owning real estate in the block or square in which said Christensen carried on and desired to carry on the business of a retail liquor dealer. He tendered to the collector of licenses the license fee for certain quarterly licenses, but he did not tender the license fee for any quarter or time since June 17, 1890. He has not applied to the Police Commissioners for their consent to the issue of any license for any quarter or time since September 17, 1889. For the quarter or

time involved in the charges upon which he was arrested under the three warrants issued in August, 1890, he neither applied to the Police Commissioners for their consent to the issue of a license, nor tendered the license fee to, nor requested a license from, the License Collector.

Points and Authorities.

I.

Any State or its municipalities that have been invested with the power, may prohibit entirely or restrain and regulate under any conditions or restrictions it or they may deem expedient, the sale or manufacture of intoxicating liquors. The keeping of the same for sale, the forfeiture of the property, search warrants, injunctions, houses and places nuisances, places in which reputed intoxicating liquors are kept, civil and criminal proceedings and liabilities, and licenses under all sorts of conditions and restrictions, and limiting the number of licenses, controlling the location, discretion as to individuals, annulling or revoking the license, granting or refusing the same, etc., may all be prohibited or provided for by criminal and civil laws and ordinances.

All such laws and ordinances are constitutional and not repugnant to the Constitution of the

United States, either before or since the late amendments thereto.

U. S. vs. Ronan, 33 Fed. Reporter, p. 120.

Re Hoover, 30 Fed. Reporter, p. 55.

Bartmeyer vs. Iowa, 18 Wallace, p. 129.

Kidd vs. Pearson, 128 U. S., p. 1.

Beer Co. vs. Massachusetts, 97 U. S., 25.

Muegler vs. Kansas, 123 U. S, p. 655.

License Cases, 5 How. (U. S.), p. 504.

Foster vs. Kansas, 112 U. S., p. 206.

Ellenbecker vs. Plymouth Co., 134 U. S., p. 40.

In re Guerrero, 69 Cal., p. 88.

In re Bickerstaff, 70 Cal., p. 35.

Ex parte Campbell, 74 Cal., p. 20.

Wiggins vs. Varner, 67 Ga., p. 583.

Whittier vs. Mayor of Covington, 43 Ga., p. 421.

Groesch vs. State, 42 Ind., p. 527.

Rohrbacker vs. Jackson, 51 Miss., pp. 735, 741.

Winants vs. Bayonne, 15 Vroom. (44 N. J.), p. 114.

House vs. State, 41 Miss., p. 737.

City of Eureka vs. Davis, 21 Kansas, p. 578.

Re Bush, 32 Iowa, p. 250.

Devin vs. Belt, 17 Atlantic Reporter, p. 375.

Wood vs. State, 36 Ark., p. 36.

Ex parte Burnside, 86 Ky., p. 423.

State vs. Allmond, 2 Houston's, (Delaware) p. 612.

State vs. Court, etc., 36 N. J., (7 Vroom.) p. 7.

Kittering vs. Jacksonville, 50 Ill., p. 39.

State vs. Ludington, 33 Wis., p. 107.

Jones vs. People, 14 Ill., p. 196.

State vs. Wheeler, 25 Conn., p. 290.

State vs. Brennan's Liquors, 25 Conn., p. 278.

Santo vs. State of Iowa, 2 Iowa, (Clarke) p. 1.

Sanders vs. State, Ib., p. 230.

State vs. Stucker, 58 Iowa, p. 496.

Our House, No. 2, vs. State, 4 G. Greene's (Iowa), p. 172.

Zumhof vs. State, Ib., p. 526.

State vs. Donehey, 8 Iowa, p. 393.

Reynolds vs. Geary, 26 Conn., p. 179.

Oviatt vs. Pond, 29 Conn., p. 479.

People vs. Gallagher, 4 Mich., p. 244.

People vs. Hanelly, 3 Mich., p. 330.

Corn vs. Clapp, 71 Mass., p. 97.

Corn vs. Howe, 79 Mass., p. 26.

LaCroix vs. Co. Comrs. of Fairfield, 50 Conn., p. 32.

Metr. Board of Excise vs. Barbie, 34 N. Y., p. 657.

Fell vs. State, 42 N. Y., p. 89.

Ex parte Kennedy, 3 S. W. Reporter, p. 114.

State vs. Bradley, 26 Fed. Reporter, p. 289.

Tanner vs. Village of Alliance, 29 Fed. Reporter, p. 196.

Pearson vs. International Distillery, 34 N. W. Reporter, p. 1.

Ex parte Sevan, 96 Mo., p. 46.

Martin vs. Blattner, 25 N. W. Reporter, p. 131.

Mette vs. McGucken, 25 N. W. Reporter, p. 338.

Pleuter vs. State, 11 Neb., p. 547.

State vs. Movally, 50 Conn., p. 215.

State vs. Thomas, 47 Conn., p. 546.

State vs. Buckley, 40 Conn., p. 246.

State vs. Morgan, 40 Conn., p. 44.

State vs. Robinson, 33 Me., p. 564.

State vs. Barrels of Liquors, 47 N. H., p. 369.

Lincoln vs. Smith, 27 Vt., p. 328.

Gill vs. Parker, 31 Vt., p. 613.

Bancroft vs. Riker, 21 Vt., p. 456.

Valid laws passed in the exercise of this sovereign right of the State have prohibited—

Sales within 2 miles of the State Prison; within 1 mile of the Insane Asylum; within 1 mile of the University of California, or in the State Capitol, or in the grounds belonging thereto.

Ex parte McLain, 61 Cal., 436.

Selling on Sundays, election days, within vicinity of fairs, camp-meetings and other gatherings of the people.

Pleuter vs. State, 11 Neb., p. 575.

Within a mile of an incorporated city or village.

Pleuter vs. State, 11 Neb., p. 575.

Within 1 mile of the Soldiers' Home.

39 N. W. Reporter, p. 40.

Within 400 feet of a public school.

Com. vs. Whelan, 134 Mass., 206.

In re Liquor Locations, 13 R. I., p. 733.

Within 4 miles of an incorporated institution of learning.

Tilley vs. State, 78 Tenn., (10 Lea.) p. 35.

State vs. Tarver, 79 Tenn., (11 Lea.) p. 650.

Screens, etc., to prevent the public from seeing into the place.

Com. vs. Casey, 134 Mass., p. 194.
Com. vs. Castello, 133 Mass., p. 192.

Such a licensee holds his license at the mere grace or pleasure of the power granting the same.
State vs. Ludington, 33 Wis., p. 107.

Even after a person has paid for and obtained such a license it is *not a contract or property.*

La Croix vs. Co. Comrs. of Fairfield Co., 50 Conn., p. 321.
Calder vs. Kurby, 71 Mass., p. 657.
Columbus City vs. Cutcomb, 61 Iowa, p. 672.
Com. vs. Brennan, 103 Mass., p. 70.
People vs. Wright, 3 Hun., p. 308.
People vs. Board, etc., 59 N. Y., p. 92.
Fell vs. State, 42 My., p. 89.
State vs. Holmes, 38 N. H., p. 225.

"The subject of retailing liquor has from the "*earliest times* been subject to regulation."

Rohrbacker vs. City of Jackson, 51 Miss., p. 741.

"*From the earliest stage of our civilization* the "sale of intoxicating liquors has been looked upon "as a species of trade which was or might be in- "jurious to the public weal, and hence it has "been at all times considered a proper subject of

" police regulation, *not as affecting the commercial*
" *interests of the country, but as affecting directly*
" *the welfare of the citizens and public morals.*"

Mette vs. McGucken, 25 N. W. Reporter (Neb.), p. 338.

Judicial dicta on drink.—" Almost every crime has its origin more or less in drinking"—Judge Gurney. " Ninety-nine cases out of every hundred are caused by drinking"—Judge Erskine. " If it were not for drink you (jury) and I would have nothing to do"—Judge Pattison. " If all men could be persuaded from the use of intoxicating drinks, the office of judge would be a sinecure"—Judge Alderson. " Three-fourths of the cases of crime have their origin in public houses and beer shops "—Judge Wightman. " Intemperance has destroyed large numbers of people and will, at its present rate of increase, in time destroy the country itself"—Justice Grove. " I can keep no terms with a vice that fills our gaols and destroys the comfort of homes and the peace of families, and debases and brutalizes the people of these islands."—Chief Justice Coleridge. Virginia Law Journal.

See Criminal Law Magazine and Reporter, Vol. XII, No. 2, March, 1890, p. 301.

" We cannot shut out of view the fact, within the knowledge of all, that the *public health, the*

public morals, and the public safety may be endangered by the general use of intoxicating drinks, nor the *fact established by statistics* accessible to everyone, that the *idleness, disorder, pauperism and crtme* existing in the country are, in some degree at least, traceable to this evil."

Muegler vs, Kansas, 123 U. S., p. 662.

"Common experience has shown that the general and unrestricted use of intoxicating liquors tends to *produce idleness, disorder, disease, pauperism and crime.*"

Leisy vs. Hardin, 135 U. S., p. 159.

"It is not necessary for the sake of justifying the State legislation, now under consideration, to array the *appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits.* The police power, which is exclusively in the States, is alone competent to the *correction of these great evils* and ALL MEASURES OF RESTRAINT OR PROHIBITION necessary to effect the purpose, are within the scope of that authority. There is no conflict of power or of legislation as between the States and the United States. Each is acting within its sphere, and for the public good, and if a *loss of revenue* should accrue to the United States from a diminished consumption of ardent spirits she will be the *gainer a thousand-*

fold in the health, wealth and happiness of the people."

License Cases, 5 How., p. 632.

"There is no statistical or economical proposi-
"tion better established nor one to which a more
"general assent is given by readingd an intelli-
"gent minds, than this, that the use of intoxicat-
"ing liquors as a drink, *is the source of more*
"*want, pauperism, crime and public expense than*
"*any other cause, and perhaps it should be said,*
"*than all other causes combined.*

Santo vs. State of Iowa, 2 Iowa, (Clark), p. 190.

"It would seem it could hardly be questioned
"at this day that it belongs to the police power
"of the State to regulate the retail dealing in and
"sale of intoxicating liquors. Perhaps all the
"States have legislated upon the subject, some by
"total prohibition and others by dealing with the
"subject under rules and regulations. Such
"legislation rests on the popular conviction that
"it is to *the interest of morals, sobriety, industry*
"*and good order that* the State should hold the
"traffic under surveillance."

Rohrbacker vs. City of Jackson, 51 Miss., p. 741.

"No one, it is presumed, can claim a license to
"retail spirits as a *matter of right.*"

License Cases, 5 How. (U. S.), p. 597.

The selling of liquors is not a *right.*

Ex parte Burnside, 86 Ky., p. 428.

The police power of a State as to intoxicating liquors is not affected by the late amendments to the United States Constitution. *It remains as it was.*

Bartemeyer vs. Iowa, 18 Wallace, p. 132.

Such laws do not violate the privileges and immunities of citizens of the United States, nor deprive him of property without due process of law.

Ib., 132.

"But no case has held that such a law was void as violating the privileges or immunities of *citizens of a State or of the United States.*"

Ib. 133.

Only "the rights of the citizen *previously existing and dependent wholly on State laws for their recognition are now placed under the protection of the Federal Government* and are secured by the Federal Constitution."

Ib., 137.

Selling intoxicating liquors "is not one of the rights growing out of citizenship of the United States,"

Ib., 133.

Muegler vs. Kansas, 123 U. S., p. 659.

U. S. vs. Ronan, 33 Federal Reporter, p. 120.

Re Hoover, 30 Federal Reporter, p. 55.

" does not abridge the liberties or immunities of " citizens of the United States or deprive any of " property without due process of law, nor in any " way contravene any provision of the XIV " Amendment of the Constitution of the United " States.

Kidd vs. Pearson, 128 U. S., p. 16.

" does not infringe any right, privilege or immu- " nity secured by the Constitution of the United " States is made clear by the decision of this " Court rendered before and since adoption of " the XIV Amendment."

Muegler vs. Kansas, 123 U. S., p. 657.

The XIV Amendment does not take away from the State those powers of police that were reserved at the time the original Constitution was adopted.

Ib., p. 663.

" The license system as adopted in all the " States, restrains persons from selling by retail " who have not taken a license; and a license to " retail spirits is granted by the Court or some " other body, *at its discretion and on certain con-*

" *ditions.* This is the character of the law under " consideration. The applicant, to obtain a license, " must be *recommended by a majority of the se-* " *lectmen* of the town as a person of good moral " character. * * * But the Commissioners " *are not required to grant any licenses when in* " *their opinion the public good does not require* " *them to be licensed.*"

License cases, 5 How. (U. S.), 590.

Commissioners of County and Mayor and Alderman of Boston may license as many retailers " as they shall think the public good may require."

Ib., p. 508.

To sell for mechanical, medical, culinary or sacramental purposes must obtain permit from Supervisors, who may grant permit if they deem it " necessary and proper for the accommodation of the neighborhood."

Kidd vs. Pearson, 128 U. S., p. 3.

The Federal Courts in U. S. vs. Ronan and in re Hoover distinguish the case of Yick Wo vs. Hopkins, 118 U. S., p. 356, from the present case, and decide that washing clothes is a harmless, useful and necessary occupation; that the selling of liquors is not a right growing out of citizenship of the United States, or one which the Fourteenth Amendment prohibits States from abridging; that

the States may entirely prohibit or permit it *under such restrictions or conditions as it sees fit; that the discretion of officers to grant or refuse license may be final and conclusive*, and that a law may require, before a license can issue the *written consent of ten of the nearest bona fide residents, five of whom shall be freeholders owning land* irrespective of County limits, nearest to the place of business where such spiritous liquors are to be sold.

The Courts declare:

"This power is inseparable from the sovereignty of the State. *The powers of the Courts of the Gen-*
" *eral Government have nothing to do with it.* It
" is a *local regulation* and relates *exclusively* to the
" *internal police* of the State."

Re Hoover, 30 Fed. Reporter, p. 55.

U. S. v. Ronan, 33 Fed. Reporter, p. 117.

"Possessed of the power of *absolute prohibi-*
" *tion* under the Constitution, it seems to follow
" that any *relaxation from a plenary exercise* of
" such power or *qualified or conditional enactment*
" by the Legislature, by which license to sell may
" be obtained in the way and subject to the liabil-
" ities imposed by the Act, *cannot be an enroach-*
" *ment of Legislative authority.*"

State vs. Ludington, 33 Wis., p. 107.

"Empowered to prohibit entirely, the Legisla-

" ture may license sub modo or conditionally only.
" * * * * * * * *
" It may couple the license with conditions so op-
" pressive, burdensome and unjust that no citizen
" can afford to apply for or accept the privilege
" and engage in the business, and then the Act
" though nominally otherwise may amount to a
" prohibitory law."

Ib., p. 107.

As it may prohibit, it may license or authorize the sale on such terms, by such persons and at such places, as it thinks proper.

U. S. vs. Ronan, 33 Fed. Reporter. p. 55.

" Now if the State may prohibit the sale of liquors
" altogether since it is *clearly not a 'privilege or*
" *an immunity'* in the meaning of the Constitu-
" tion, may it not authorize the sale on such terms,
" by such persons and at such places as it thinks
" proper? And, if it may do this directly, *may*
" *it not delegate to others the exercise of the power?*
" *It has simply delegated a portion of its sover-*
" *eignty to the County Commissioners* of Chatham
" County. The Commissioners in the exercise of
" that sovereignty refuse a license to the petitioner.
" *The discretion must rest somewhere.* The State
" might have exercised it. It intrusts its dis-
" cretion to the Board of County Commission-
" ers, and, as I have said, by the terms of the

" grant, this discretion is final and not reviewable."

In re Hoover, 30 Fed. Rep. 54, per Spier, J.

The following are other instances of valid liquor laws.

County Commissioners or ordinary invested with "power to grant or refuse such application" and their decision is conclusive and final.

Wiggins vs, Varner, 67 Ga., p 583.

U. S. vs. Roman, 33 Fed. Rep., p. 120.

Re Hoover, 30 Fed, Reporter, p. 52.

"Shall, before receiving such licence, produce the written *recommendation of four of his nearest neighbors*, each signature to represent a separate and distinct establishment."—Ordinance of Covington.

Whitten vs, Mayor of Covington, 43 Ga., p. 421.

A petition signed by himself and *a majority of the resident legal voters of the ward* of the city.

Groesch vs. State, 42 Ind., p. 527.

A petition of the *majority of the male citizens* over 21 years, and a *majority of the female citizens* over 18 years, resident in a certain locality.

Rohrbacker vs. Jackson, 51 Miss., p 735.

Or *majority of freeholders* or *consent of Board.*

Ib., p. 735.

Or *six respectable freeholders.*

Ib. p. 741.

Or a *majority of voters* resident in Police District.

Ib., p. 742.

May revoke license.

Ib., p. 742.

"Recommendation in writing of *at least ten freeholders* residing and owning real estate in the City of Bayonne.

Winans vs. Bayonne, 15 Vroom., (44 N. J.), p. 114.

Recommended by a *majority of the legal voters,* in the Town, City, or Police beat.

House vs. State, 41 Miss., p. 737.

Petition of a *majority of the adult residents,* etc.

City of Eureka vs. Davis, 21 Kansas, p. 578.

Certificate of *twelve citizens of the township* in which he resides.

Re Bush, 32 Iowa, p. 250.

Written consent of ten of the nearest *bona fide* residents, five of whom shall be freeholders owning land, irrespective of county limits, nearest to the place of business where such spiritous liquors are to be sold. The law also requires the applicant to take an oath not to sell to minors within twelve months without consent of parents or guardians.

U. S. vs. Ronan, 33 Fed. Reporter, p 117.
Re Hoover, 30 Fed. Reporter, p 51.

Written consent *of two-thirds of the citizen freeholders, male and female.*

Wiggins vs Varner, 67 Ga., p. 584.

Recommended by *five respectable freeholders* of his immediate vicinity as a fit person to traffic in the article.

Devin vs. Belt, 17 Atlantic Reporter, p. 375.

An ordinance that no municipal license for sale of liquors, etc., "shall issue to any person *until a permit in writing from the Board of Police Commissioners* authorizing such issue sholl have been filed with the Clerk of the Council and the Board of Police Commissioners shall have *power to issue such permit and revoke the same at any time.*"

In re Guerrero, 69 Cal , p. 95.

An ordinance providing that a municipal license to sell liquors can only be obtained by an application to the City Council, founded upon a petition accompanied by a certificate of five respectable citizens of the immediate vicinity in which the business is to be conducted, as to his character and that he is a suitable person, and further providing that the petition and certificate shall be referred to the Mayor, President of the City Council and Chief of Police for investigation, as

to his moral character and whether he is a suitable person, and who shall report at next regular meeting, and the Council, if it finds he is of good moral character and a suitable person, shall order license to issue, and further providing that Council may revoke such order and no further license shall issue, is valid.

In re Bickerstaff, 70 Cal., 35.

License from Town Council who were prohibited to grant licenses whenever the voters of the town in town meeting decided that none should be granted.

License cases, 5 How. 506–10, 540.

As to other matters.

Statute prohibiting the use of any building for carrying on the business of slaughtering cattle, for melting or rendering establishment, or for other noxious or offensive trade or occupation, *without permission of the Mayor and Aldermen* or *the Selectmen*, is a constitutional exercise of the police power.

Waterman vs. Mayo., 119 Mass. p. 315.

Ordinance prohibiting the occupation of a stand for vending commodities in the streets, may make the prohibition absolute or conditional, such as the consent of the Clerk of Faneuil Hall.

Dillon on Mun. Corp., 3d Ed. Sec. 389.

In re Nightingale, 11 Pick, 161.

Ordinance prohibiting the throwing or depositing any glass, broken ware, dirt, rubbish, or filth upon any public streets or grounds or *private* premises or *anywhere*, except in such place as may be designated for that purpose by the *Superintendent* of Public Streets.

Ex parte Casinello, 62 Cal, p. 538.

A statute authorizing the harbor master to regulate and station all ships and vessels in the East and North rivers and to remove all vessels and to determine how far and in what instances it was the duty of masters of vessels to accommodate each other in their respective situations and imposing a penalty for refusing or neglecting to obey directions.

Vanderbilt vs. Adams, 7 Cowen, p. 351.

An ordinance creating a Superintendent of Wharves, with full power to order and regulate the laying and mooring of vessels at wharves, and when and how vessels shall haul off to allow other vessels to pass or wind, or to receive or discharge their cargoes, and when, in his judgment, an injury may be occasioned to any wharf by reason of an impending storm, to order and cause any vessel lying at the wharf to haul off.

Gregory vs. City of Bridgeport, 41 Conn., p. 80 and 85.

An ordinance giving power to the Mayor, or any person or persons he may direct, to give directions respecting the standing of hackney carriages while waiting for passengers at theatres, etc., and the route they shall go when going and leaving.

Com. vs. Robertson, 5 Cush., p. 433.

Ordinance prohibiting alteration or repair of wooden buildings within fire limits, without permission of majority of fire wardens and majority of committee on fire department and Mayor.

Ex parte Fisk, 72 Cal., p. 125.

Ordinance prohibiting the rebuilding or repair of wooden buildings within certain limits, "unless he shall have previously obtained permission from the Common Council to do so."

Brady vs. Northwestern Ins. Co., 11 Mich. (7 Cooley) p. 425.

Ordinance forbidding the erection, enlargement, elevating or placing of any wooden building within the fire district *without permission* by the Board of Aldermen and authorizing the Board to grant permits to erect, repair, remove or enlarge, and also making it the duty of certain officers, after reasonable notice, to abate it.

Hine vs. City of New Haven, 40 Conn., p. 478.

Welch vs. Hotchkiss, 39 Conn., p. 140.

Ordinance prohibiting the erection or repair of wooden buildings within certain limits, and authorizing the Clerk to issue a license provided the *permission is approved by the Mayor and Chief Engineer* of the Fire Department.

Alexander vs. Town Council of Greenville,
54 Miss., p. 659.

The fact there is no Chief Engineer of the town makes no difference.

Ib., p. 659.

In England, or in the States of our Union, or in the Colonies before our independence, the selling of ardent spirits has never been recognized as a right of citizen, subject or person. In fact, it has never been so recognized in any civilized country. It has not been considered one of those fundamental rights to life, liberty and the pursuit of happiness which are secured by those maxims of Constitutional law which are monuments showing the victorious progress of the race in securing to men the blessings of civilization.

The liquor traffic and drunkenness vice, crime, disorder, misery, want, degradation and brutality are not made by our Constitutions an inseparable part of American civilization and American freedom, nor placed beneath the shields of their protection. This traffic has always been under the

absolute control of the police power of nations, States and colonies.

The following are some of the earlier laws upon the subject:

In the year 1552, in the reign of Edward VI, the English Parliament enacted a law the preamble of which reads:

"Forasmuch as *intolerable hurts and troubles* to the commonwealth of this realm doth *daily grow and increase* through such abuses and disorders as are had and used in common alehouses and other houses, called tippling houses, it is therefore enacted," etc.

See Anno Quinto and Sexto, Edward VI, Chapter 25, Vol 5, Pickering's Statutes-at-Large, p. 391.

This statute provides that two Justices of the Peace "shall have *full power and authority*, by "virtue of this act, within every shire, city, "borough, town corporate, franchise and liberty, "where they be Justices of the Peace, *to remove*, "*discharge and put away* common selling of ale "and beer in the said common alehouses and tip-"pling houses in such town or towns and places "when they shall think meet and convenient, and "that none, after the first day of May next com-"ing, *shall be admitted or suffered to keep any com-*"*mon alehouse or tippling house* but such as shall be

" thereunto admitted and allowed in the open ses-
" sions of the peace, or else by two Justices of the
" Peace, whereof the one to be of the quorum."

Vol. 5, Pickering's Statutes-at-Large, p. 391.

New Hampshire made it an offense "if any " person within the State shall, after the first day " of May next, sell any wine, rum, brandy or " other spirits in any lesser quantity than 15 gal-" lons, to be delivered at one time, without the " approbation of the selectmen of the town, par-" ish, or place where he or she dwells, and a li-" cense from the Court of General Sessions of the " place within the county where such person " dwells."

Statute of New Hampshire of December 26, 1778.

See Laws of N. H., 1879, printed by John Metcher, p. 239.

For other license regulations see

Provincial Laws of N. H., Ed. 1761, pp. 64 and 143.

Massachusetts.—Justices of the Peace "to " grant licenses to such persons within the same " county, *being first approved by the selectmen of* " *each town* where such persons dwells, whom they " shall *think fit to be employed* as retailers of wines " or strong drink.

Provincial Law of 1692.

See Acts and Resolves of Province of Massachusetts Bay, Vol. 1, p. 37.

Certificate from Selectmen, Act of 1692, p. 56.

Massachusetts—Act of 1701–2: Justices of Court of General Sessions "to renew and grant licenses "to such and so many persons within the same "county to be retailers of strong drink as they "shall judge suitable and for the convenience and "accommodation of the county."

Ib., 476.

Virginia—Act of 1668: Commissioners of each county required to take special care for the suppressing and restraint of the number of tippling houses in the respective counties and to prevent more than one or two, and also with discretion as to ports, ferries and great roads.

Vol. 2, Hening's Statutes at Large, p 269.

Virginia—Act of 1705: County Court to grant licenses. *Discretion as to whether it is convenient to suffer such a house to be set up.*

3 Hening's Statutes at Large, p. 396.

Maryland—Act of May, 1780: Justices of each county in court sitting *empowered and authorized to grant licenses to such person or persons as they shall think fit.*

Chapter XXIV, passed at March Session, 1780.

See Vol. 1, Laws of Maryland, by Wm. Kilty, Ed. 1799.

The laws of Maryland in an act concerning the territory of Columbia and the City of Washington of 1791, provides "the said Commissioners, "or any two of them, may grant licenses for "retailing distilled spirits within the limits of the "said city (Washington) and suspend or declare "the same void."

Vol. 2, Kilty's Laws of Maryland, Chap. 7, Sec. 12.

Georgia—Act of 1791: Justices of the inferior court for the county "may at their discretion grant a license" for a tippling house or retail liquors.

Prince's Digest of Laws of Ga., p. 487.

South Carolina—Act of 1711: No license to be issued by the receiver without "the approbation "and consent of Colonel William Rhett, Colonel "Hugh Grange and Mr. Ralph Izard, or any "two of them," "who are authorized and em- "powered to forbid, hinder or restrain the receiver "to give or grant any license to any person who "they shall in their judgment think unfit to retail "strong drink."

Vol. 2, Statutes at Large of South Carolina, by Thomas Cooper, p. 364, Sec. 7.

North Carolina—Act of 1798: "May at the "discretion of such court (court of the county) be "ordered to have a license."

Haywood's Manual of Laws of N. C., p. 400; also Vol. 2, Laws of N. C., p. 368, Chap. 501.

Connecticut—Act of 1703: County Court may license *those the Justices think fit.*

Acts and Laws of Her Majesty's Colony of Conn., printed by Timothy Green, 1715, p. 1230.

Connecticut—Act of 1730: The Civil Authority, Selectmen, Constables and Grand Jurymen, in the respective towns, shall in January annually *nominate the person or persons whom they or the major part of them think fit and suitable to keep such places*, and the next County Court shall grant them licenses; but if the County Court thinks the number too great, it may lessen the same. The County Court may also refuse licenses to such as they may upon proof find unfit.

Acts and Laws of His Majesty's Colony of Conn., printed by Timothy Green, 1750, p. 129.

New Jersey—Act of 1797: Courts of General

Quarter Sessions of the Peace to grant licenses, but no person or persons shall be licensed "*but* "*such as shall be recommended by the chosen Free-* "*holders, the Commissioners of Appeal and the* "*Overseers of the Poor,* or at least *two thirds* of "them, of the township or precinct, who shall "certify that the person is of good repute for "honesty and temperance." And even then, "the "said Court may, *in their discretion*, grant the "license."

Laws of the State of New Jersey, by Wm. Patterson, p. 235, Sections 1 and 2.

New Jersey—Act of 1738: Justices of the Peace only to grant licenses in open session, "and "to such *person or persons only as shall come to* "*them well recommended by a letter or instrument* "*under the hands of the freeholders neighbors to* "*such person craving license.*"

Acts of General Assembly of the Province of New Jersey, by Samuel Allenson, p. 103, Sec. 2.

New Jersey—Act of 1768: Court of Quarter Sessions of the Peace grant licenses only to "*such* "*as are recommended to the Court by at least six* "*freeholders* of the neighborhood of the place," who shall certify he is of good repute for honesty and temperance.

Acts of Gen. Ass. of the Prov. of N. J., by Allenson, p. 302.

Pennsylvania—Act of 1710: No license "*un-* "*less such person shall be first recommended by the* "*Justices* in the respective County Courts," and in Philadelphia by the Justices of their Quarter Sessions or Court of Record, respectively, to the Lieutenant Governor for the time being, for his license for so doing.

Vol. 1, Laws of Penn., by Dallas, pp. 84 and 85.

Pennsylvania—Act of 1786: Justices of the Quarter Sessions in each county, at the first annual session, to declare and limit *at their discretion*, the *number* for the county for which licenses may issue.

Vol. 2, Laws of P., by Dallas, p. 481.

Pennsylvania.—Act of 1794: Licenses to the persons "to whom recommendations shall have been "granted by the Judges of said Courts" (Courts of Quarter Sessions).

Vol. 3, Laws of Penn., by Dallas, p. 577.

Delaware.—Act of 1777: "A recommen- "dation from three or more of the Justices of the "Peace of the county" * * * setting forth "that he "is fit and well qualified for keeping "such a house.

Vol. 2, Laws of Delaware from 1700 to 1797, p. 597, sec. 5.

Delaware.—Act of 1740: "Recommendation from the Justices of the Court of Quarter Sessions, to be held in August term in each county, to the Governor, setting forth that the person is a fit person and well qualified for keeping the same."

Vol. 1, Laws of Delaware, p. 193.

Delaware.—Act of 1793: Must present to the Judges of the Court of Common Pleas a petition and obtain a recommendation signed by them "in favor of the person applying for such license."

Vol. 2, Laws of Delaware, p. 1092.

The opinion of the Hon. Judge in this case reads:

"It also appears in the record that the petitioner tendered the amount of his license fee "and requested the written consent of the majority of the Police Commissioners to the issue "thereof, and it was refused; that there were not "twelve citizens of San Francisco owning real "estate in the block or square in which he desired "to carry on his business as a liquor-dealer, "and that it was therefore impossible to obtain "the assent of twelve such citizens, and that a license was consequently refused."

Now, there was no evidence whatever, documentary or oral, read or presented to the Court. The matter was heard and submitted on the exceptions or demurrer to the return of the Chief of Police. (See Transcript, page 44, folio 87.) The denials and allegations of the return must, therefore, we submit, be taken as true. The return of the Chief of Police shows that Christensen *both* tendered his license and applied for consent to the Police Commissioners in only one instance – that is, as to one quarter. This statement in the opinion is only applicable to one of the warrants or offenses under which he was held, the first warrant issued June 21, 1889. The return shows that there were more than sixteen citizens of San Francisco owning real estate in the block or square where he carried on the liquor business. He therefore could have obtained the consent of twelve such citizens if they desired to give it to him.

Even if there were less than twelve citizens owning real estate in the block, which Christensen in his petition alleges, but which the Chief of Police in his return certifies is not true, and certifies there were more than sixteen, it would not affect the validity of the law. The State or the City and County of San Francisco has the right to prohibit the traffic in a block or square wherein

there are less than twelve such citizens, or to require the recommendation of twelve. If there are not twelve then the law is prohibitory.

The opinion of the Honorable Circuit Court reads:

"It is not unlawful to deal in liquors or sell liquors at retail in California or San Francisco, any more than it is to keep a laundry, which business also pays a license."

This does not seem to be correct. Section 11 of Article XI of the State Constitution, which reads:

"§11. Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws;" and section 7 of same article which reads: "The provisions of this Constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated government" (consolidated city and county government), invest the City and County of San Francisco and every county, city, town, township or city and county with power to entirely prohibit etc. the traffic or sale or to license or regulate or to restrain it, under such conditions and restrictions it deems expedient. This the Supreme Court of the State has expressly decided.

Ex parte Campbell, 74 Cal., p. 20.
Re Guerrero, 69 Cal., p. 88.
Re Bickerstaff, 70 Cal., p. 35.
Ex parte Mount, 66 Cal., p. 448.
Ex parte Wohlers, 66 Cal., p. 269.
Ex parte Linehan, 72 Cal., p. 114, and ex parte Christensen, present case.

Therefore the State Constitution places it under the absolute control of local legislation by local authorities as an objectionable traffic. It does not regard it as a lawful, wholesome, useful or necessary occupation.

Statutes of California prohibit the traffic and sale on election days. Statutes of 1873, p. 297, within one mile of a camp or field meeting for religious worship. Penal Code, § 304, within one mile of the grounds set apart for a college in Colusa county. Statutes of 1875-6, p. 691, within two miles of the State prison. Amendments to Codes of 1875-6, p. 109, within two miles of the University of California. Statutes of 1873-4, p. 12, within one mile of the insane asylum. Statutes of 1873-4, p. 27, within the Capitol buildings or grounds. Statutes of 1880, p. 273. The sale, etc., is prohibited by ordinances of the local governments in the following cities and towns: Pasadena, Alhambra, Artesia, Compton, Covina, Garden Grove, Glendora, Long Beach, Clear

Water, Monrovia, The Palms, Pomona, Redondo, San Dimas, South Pasadena, Whittier, Potter Valley, Willits, Palermo, Buena Park, Orange, Westminster, El Modina, Tustan, Lompoc, Ontario, Coronado Beach, Del Mar, Escondido, Elsinor, Fallbrook, Piermont, San Jacinto, San Marcos, Wildomar, Valle Vista, Winchester, Ceres, Orange Vale, College City, Riverside, Chico Vecino, Pacific Grove and Modoc county.

Restrictive ordinances of a similar character to the one involved in this case are common in California.

The opinion of the Circuit Court also states that the record shows there are between 3000 and 4000 licensed retail liquor dealers in San Francisco. We cannot find such a statement in the record. If it is a proper matter for consideration, we have been informed that in round numbers there were nearly 3000.

Since the law requiring the consent of the Police Commissioners and recommendation of freeholders, there have been closed by the Police Commissioners over seven hundred vicious and criminal liquor places.

The opinion of the Circuit Court reads: "The Chief Justice, notwithstanding the fact that the decision was rendered by a divided Court, refused to allow the writ, thereby depriving him of the right guaranteed to him by the Constitution and

Laws of the United States, to have the question as to whether the Ordinance violates the Constitution of the United States reviewed by the Supreme Court of the United States."

The Supreme Court of the State of California consists of seven Judges. Six Judges concurred in the decision and opinion rendered by the Supreme Court in this matter. Justice McFarland, an associate Justice, dissented. The opinion passes upon State and Federal questions. Justice McFarland did not file or write a dissenting opinion. But we are permitted by Justice McFarland to state that he did not dissent *on any of the Federal questions involved*. On an ex parte application the Chief Justice refused to allow a writ of error to the Supreme Court of the United States. The Chief Justice did not consider that such a writ of error was a matter of right, but that it was his duty under the Constitution and laws of the United States, to exercise his judicial discretion in the matter, and in the exercise of that discretion he refused to allow the writ, believing it was the settled law under the decisions of the Supreme Court of the United States for nearly half a century that the enactment of such a law appertained to the police power of a State.

The opinion of the Circuit Court reads: "It would seem to be upon its face—like other license

ordinances—a mere revenue measure." This does not seem to be correct. The provision requiring consent of Police Commissioners or citizens owning real estate, make it an ordinance regulating and restraining the traffic, and, to a certain extent, prohibitory. Even licenses issued without requiring consent may be resorted to for purposes of restraint, limitation and prohibition. This, of course, is the principle of "high license," as it is called.

The argument that the power of the Police Commissioners or citizens to refuse consent or recommendation may be abused, and therefore the ordinance is invalid, is not sound when applied to this traffic. "This logic is not good when ap-
"plied to the practical operations of the govern-
"ment. The argument is, power may be abused,
"therefore it cannot be exercised. What power
"dependent on human agency may not be
"abused?"

License Cases, 5 How., 591.

The Police Commissioners have discharged their duties and administered these ordinances fairly, impartially, justly and legally in all cases, and to the best interests of good government. They have suppressed and prevented a great amount of vice, crime, disorder, want and degradation. The Police Commissioners are Richard P.

Hammond, capitalist; William Alvord, President of the Bank of California; Robert J. Tobin, Manager of the Hibernia Savings and Loan Society, and P. Crowley, Chief of Police, gentlemen of integrity, moral worth, sound judgment and patriotic fidelity to duty and the interests of good government.

These ordinances receive the support of the community and have been maintained by both political parties during the different administrations.

It can be said of these ordinances as was said by the Federal Judge of another similar ordinance in Georgia: "The law is reasonable, necessary and beneficial."

In re Hoover.
30 Federal Reporter, 51.

The Police Commissioners, when first invested with the power, caused to be published the rules which would govern their discretion, to the effect that they would not consent to the issue of a license, unless required to do so by the recommendation of the twelve citizens, in those cases where the place of business was a disorderly place, place of crime, nuisance to the neighborhood, or a resort of criminals, thieves, drunkards or vagrants, or it was conducted so as to be violative of the criminal laws and the rights of others, or where the keeper is a minor.

The case of Yick Wo vs. Hopkins seems to exempt these liquor laws from its principle or operation.

118 U. S., p. 368.

Washing of clothes is a wholesome, useful and necessary occupation of life and civilization, and selling of intoxicating liquor is not. There is in the nature of things a difference between the wholesome, useful, harmless and necessary occupations and the liquor traffic, which has caused so much harm, public expense, etc., etc. To place the wholesome, harmless and useful occupations of life and civilization under the protection of the Constitution of the United States may be considered beneficial; but to place by judicial interpretation this objectionable traffic, with its accompanying evils, under that protection, and deprive the States of their legitimate control over it for the public welfare, can accomplish no good purpose for the people of the United States, either in their national or State capacities.

The State questions involved in this case, as contradistinguished from the Federal questions, have all been settled by the decision of the Supreme Court of the State against the contentions of the petitioner.

We submit that the traffic so materially affects the morals, health, wealth and happiness of the

people that it so endangers or affects the safety and peace of the community; that it is the parent of so much immorality, crime and disorder; that it is the source of so much misery and sorrow to individuals and families; that it is a cause of so much public expense and of so much disease, degradation and brutality, that the prohibition, regulation and restraint thereof peculiarly appertains to the police power of the State.

That it is not a right or immunity under the National or State Constitutions and laws, and therefore not under the protection of any of the provisions of the Federal Constitution.

That as the State or its municipalities may prohibit it, they may restrain or permit it under any conditions or restrictions they deem expedient.

DAVIS LOUDERBACK,
Counsel for Appellant and the People.

Office Supreme Court U. S.
FILED
OCT. 25 1890
JAMES H. MCKENNEY
CLERK

1317. OCTOBER TERM, 1890.

IN THE SUPREME COURT OF THE UNITED STATES.

CROWLEY, RESPONDENT AND APPELLANT,

vs.

CHRISTENSEN, PETITIONER AND APPELLEE.

BRIEF FOR APPELLEE.

ALFRED CLARKE,
For petitioner.

JOSEPH D. REDDING.

FILED OCTOBER 23, 1890.

No. 1,317.

IN SUPREME COURT OF THE UNITED STATES.

CROWLEY, RESPONDENT AND APPELLANT,
vs.
CHRISTENSEN, PETITIONER AND APPELLEE.

BRIEF FOR APPELLEE.

This important case seems to turn on the question "Can arbitrary power unregulated by written rules be applied to the retail liquor business?

Our supreme court, on August 2nd, affirms that it can. 24 Pac., 747.

We say that this deliverance is in direct opposition to 118 U. S., 356 and 129 U. S., 114.

We are supported by People *v.* Haug, 37 N. W. R., 24; 698 Mich., 549. This case is express and to the point.

Dunham *v.* Hough, 45 N. W. 437-8 is also express and to the point, May 9th, 1890.

"Arbitrary power no man possesses in this country."
Muscoe *v.* Com., 10 S. E. R. 536, Jan. 9th, 1890.

State *v.* Pennoyer, 18 At. Rep., 878-881, is pertinent.

People *v.* Helwegen by judge Spencer of superior court of Santa Clara is also pertinent.

Peop. *v.* Marx, 99 N. Y., 377.

We say the dissenting opinion of justice McFarland in 74 Cal., 27, and the dissenting opinion of justice Ross in 69 Cal., 103, are more harmonious with the federal decisions than the majority opinions in those cases.

St. Louis *v.* Wehrning, 50 Ill., 28, is express and to the point.

Arbitrary power is contrary to the spirit of our government.

If it lay in our power to import this foreign and noxious weed it would be very unwise to do it.

The doctrine of 118 U. S., 356, perpetually excludes it from every square foot of American soil. Who wants to admit this Trojan horse?

Arbitrary power is forbidden in 113 U. S., 27-703.

Our estate in our business is a property right, 129 U. S., 114.

Our liquors are property 10 S. C. R. U. S , 686, and to this property, the protection of the xivth art. attaches by indissoluble bonds.

There is some valuable law in Janesville *v.* Carpenter, 46 N. W. 121-2.

The enforcement of state laws must be attended by the rules of common law, 115 U. S., 520.

This has been denied to us.

This absence of notice and hearing in the matter of revoking consent is fatal to the legality of the proceeding.

Chicago *v.* Minn., 10 S. C. R. U. S., 467.
Denver *v.* Darrow, 22 Pac. Rep., 787.
State *v.* Andersen, 7 So. Rep., 429.

The law must furnish some just mode to determine the duty of the citizen before he can be made to suffer a penalty.

Phila. *v.* Scott, 81 Pa. St., 80.
David *v.* N. O., 96 U. S., 105.

The cumulation of arrests to the number of ten is in the teeth of 120 U. S., 274. We showed this in the police court, but the 120 U. S. was disregarded.

The property right which we have in our liquor attracts for its protection the symmetry of the law.

The doctrine of 32 Fed., 251, negatives the denial to us of the equal protection of the law.

Our civil code, section 1667, defines lawful and unlawful. Our business was and is lawful. 57 Cal., 605; 70 Cal., 39.

There is no vacuum in space, and there is no vacuum in law.

Our supreme court, to save this order, conceives a limbo where law is absent (24 Pac., 747) and in this territory it finds scope for the play and action of arbitrary power contrary to 118 U. S., 356.

Our code knows no vacuum and no limbo. It adopts the common law. §4468, political code, and the code of civil procedure, §187, applies the common law rules to all matters not otherwise provided for.

Please read the pungent condemnation of arbitrary power on last six lines of 82 Cal., 490.

We believe that order 1845 is void under the laundry decision, 7 Saw., 229, and 26 Fed., 611, Feb. 16th, 1886.

But if we should be mistaken as to the text of the order, the maladministration of the order in the denial of hearing before decision is a clear violation of the xivth art. and the color and complexion of this persecution is demonstrated by the cumulation of arrests, 44 arrests having been made since August 2nd, 1890. This class legislation is squarely denounced in 113 U. S., 27-703, and 115 U. S., 512-519; 127 U. S., 687; 129 U. S., 114.

We rely upon the opinion of judge Wallace in Re Kennedy as bearing on due process of law, this opinion was affirmed in 82 Cal., 483.

The published reports show about three thousand saloon keepers.

Consent granted to 1588, arbitrarily refused 47, granted by freeholders 46, closed by this arbitrary power 22.

The number now under active prosecution is five, petitioner and four others.

This class legislation stands confessed and is reported annually to the board of supervisors and printed in the municipal reports. Other states have regulated this business by written laws (42 N. W. R., 821-3) and there is no difficulty in our doing so.

If it were difficult or impossible to devise rules there would be more temptation to resort to arbitrary power, but when it is so easy to copy the laws of Michigan (42 N. W., 821) which have stood the test, we see no use for straining our blessed constitution for the purpose of establishing a sort of semi-slavery in the teeth of the gospel of liberty, found in 118 U. S., 356, which guarantees to every person in this broad land a government of laws and not of men.

We know what it cost our ancestors to get away from European despots. We know the liberty which they secured and the sacrifices they made to win it, and as we read the declaration of independence and our federal constitution, and the many decisions of our U. S. supreme court, we are constrained to believe they do not mean to leave room for the play or action of purely personal and arbitrary power.

"It has respect to persons and classes of persons." 101 U. S., 30.

Denied a hearing at the outset when five minutes would have cleared away the cloud by explanation; arrested, jailed, satired by a promise of a hearing, but crushed in liberty and property unheard; a pyramid of arrests piled on us to break our spirit and compel abject surrender; denied our writ of error in the state court, we come in our misery and grief to invoke the broad shield of our blessed constitution and our equal laws. It has been found sufficient for others, we believe it will be sufficient for us.

We have just received from Washington the transcript, and we are now able to refer to the printed page by number.

It is familiar law that a case may be rightly decided for a wrong reason. In such case the appellate court will not reverse the judgment.

We have no fear of the reversal of the decision of the circuit court. It must be affirmed because it is the only proper conclusion which can result from the application to the facts in our case of the legal principles contained in 118 U. S., 356, and 129 U. S., 114.

There are some other points made in our record, on which we are entitled to be heard here.

The complaint is not sufficient.

Due process of law means an orderly proceeding adapted to the nature of the case, etc., etc. Please read Chanvin *v.* Valeton, 20 Pac., 659, also 79 Cal., 90.

A complaint which is fatally defective is *not due process of law.*

"A party must allege every material fact which he is required to "prove and will be precluded from proving any fact not alleged." 82 Cal., 323.

Both parties on this appeal have pleaded order 1845, so that order is now before this court.

If it was not pleaded, this court could not take judicial notice of its existence or contents.

This appellee is as much entitled to have the order pleaded in the police court as he is to have it pleaded here.

The appellee excepts to the return. See pp. 30 to 34 of transcript.

The complaint in the police court "charges no crime."

See p. 33, fol. 55, of transcript.

This point is made by us in our demurrer, and is necessarily involved in the decision of this case.

"No person can be punished for a public offense, except on a "legal conviction in a court having jurisdiction thereof."

California penal code, §681, and see cognate sections.

When we are put on trial in a court which, under our state constitution, has no jurisdiction of our person or of the *charge* against us, we are *deprived of our liberty without due process of law.*

This point is made by us in the court below. See p. 33, of tr., fol. 24.

Appellee refers to his affidavit. See p. 35 of tr., fol. 61.

City orders must be subject to general laws.

McDonald *v.* Patterson, 54 Cal., 245.
Earl *v.* Bd. Ed., 55 Cal., 489.
Ewing *v.* Oroville, 56 Cal., 654.
Re Maguire, 57 Cal , 608.
Donohoe *v.* Graham, 61 Cal., 277.
Thomasen *v.* Ruggles, 69 Cal., 469.
Oakland *v.* Hilton, 69 Cal., 479.
Thomasen *v.* Ashworth, 73 Cal., 75.
People *v.* Bingham, 82 Cal., 238
People *v.* Henshaw, 76 Cal , 436.
Exp. Ah You, 82 Cal., 339.
Kennedy *v.* Bd. Ed., 82 Cal., 483.

All orders which contravene the general laws of the state are void.

Muscoe *v.* Com., 10 S. E. R., 535, by court of appeals of Va.
Pennie *v.* Ries, 80 Cal., 266.
Weisenger *v.* Crooks, 82 Cal., 588.
People *v.* Toal, 23 Pac., 54-203.
Re Kunback, 23 Pac., 737.

Davis *v.* Los Angeles, 24 Pac., 771.
San Luis Graves, 23 Pac., 1032.
Exp. Keeney, 24 Pac., 31.
Exp. Reilly, 24 Pac., 807.
Oxanna *v.* Allen, 8 So., 79.

The penalty is found on p. 11 of tr., fol. 19.

Our court is not at liberty to depart arbitrarily from a line of 20 of its own solemn decisions. Such a ruling is not due process of law.

Under the deliberate ruling in Re Sic., 73 Cal., 149, and the 20 cases on p. 4, ante, this order is void by reason of conflict with the general laws of the state.

"The well-settled rule that a defendant shall not be convicted "unless the evidence proves his guilt beyond a reasonable doubt "applies to the whole and every materail part of the case, no mat- "ter whether it is as to the killing or the reason for or manner of "its commission." People *v.* Bushton, 80 Cal., 164.

Proof to the whole and every material part of the case would not be receivable unless there was averment to support it. In our case there is no averment of the existence of any order, 1589 or 1845. "*Orders must be pleaded and proved as other facts.*" 5 S. E. R., 629; Toole *v.* State, 7 So. Rep., 42-44; 80 Ga. 497.

On August 17, 1889, our court in bank held: "The return is "faulty. It does not allege that any order of the board of super- "visors was made." (*Re* Mel Ki, 80 Cal., 202.)

"It is more in harmony with our system to set forth the instru- "ment on which the action or defense is founded," * and "the "instrument must be free from defect or ambiguity." (Lambert *v.* Haskell, 80 Cal., 613.)

As to pleading facts, please see Albertole *v.* Branham, 80 Cal., 631.

Petitioner demurs specially to the return because the complaint shown in the return *charges no crime.* (See respondent's exhibit A on p. 13 of the return.) It fails to state (except inferentially) that there is any order 1589 or 1845, and inferential pleading is not pers missible. (Hazard *v.* Volger, 18 Pac., 637.) Municipal order- must be pleaded and proved.

McDonald *v.* Lane, 5 S. E. Rep., 629; 80 Ga. 497.
Norton *v.* State, 3 So. Rep., 666; 65 Miss., 297.

"The defendant in a criminal action is entitled to demand that whatever accusation is made against him, shall be made in a positive, direct form, leaving nothing to inference or argument, so that the issue may be one of fact and not logic."

Hazard *v.* Volger, 18 Pac., 37.

"There is wholly wanting a direct and positive averment that

there was, at the time of the explosion, a city ordinance in existence forbidding the storage of powder within the corporate limits in excess of 50 pounds. To say that the storage in such quantity was in violation of an ordinance may be a persuasive, indeed an infallible argument that such ordinance existed; but it falls short of an affirmative, direct allegation to that effect. That argumentative pleading is not permissible is elemental."

"Facts must be stated."

San Luis *v.* Hendricks, 71 Cal., 246.
Hedges *v.* Dam, 72 Cal., 520.
Wills *v.* 6 S. W. R., 316; 24 Tex. App., 400.

"A complaint which gave the numbers of the ordinances, specifying the dates of passage, and the substances of their provisions," was held sufficient, "*unless such ordinances are void.*"

Exparte Miranda, 72 Cal., 371.
San Luis *v.* Hendricks, 71 Cal., 242.

Our complaint does not give the dates of passage or the substance of the orders, and thus falls short of the liberal rule stated by our court in 73 Cal., 371, *supra.*

"The reference to the order by number, title and date was insufficient."

Pomroy *v.* Lappeus, 9 Or., 364.

"If not recited in full, at least the provisions of the order charged to have been violated, should have been recited. The want of such allegations rendered it fatally defective."

Harker *v.* N. Y., 17 Wend., 199.
People *v.* N. Y., 7 How Pr., 81.

"Ordinances are not public and must be pleaded."

State *v.* Mayor, 11 Hump., 217.
Alderman *v.* Finley, Eng. (Ark.), 423–516.
Beatty *v.* Knowles, 4 Pet., 152–7.
West *v.* Blake, 4 Blackford, 234.
Briggs *v.* Whipple, 7 Verm, 15–18.
Case *v.* Mobile, 40 Ala., 538.
Young *v.* Bank, 4 Cranch, 384.
Clevenger *v.* Rushville, 90 Ind., 261
Green *v.* Indianapolis, 22 Ind., 329.
Porter *v.* Warning, 69 N. Y., 254.
Lenahan *v.* People, 3 Hun., 167.
Affirmed in 62 N. Y., 623.
Garvin *v.* Wells, 8 Iowa, 288.
Winona *v.* Burke, 23 Minn., 255.
Norton *v.* State, 3 So. Rep., 666; 65 Miss., 297.
McDonald *v.* Lane, 5 S. E. R., 229; 80 Ga., 497.
Ninenger *v.* State, 8 S. W. R., 480; 25 Tex. App., 449.

Garland *v.* Denver, 19 Pac., 461.
Bishop Crim. Pro., 608.
Bishop on Stat. Crimes, 406.

"Nothing is to be presumed in favor of the judgment of the police "court. If the record does not show on its face the facts necessary "to give the court jurisdiction they will be presumed not to have "existed. Either the complaint sufficiently refers to and makes part "of itself orders 697, (1589,) and 1196 (1845,) or it does not. If it "does not there is nothing in the proceedings of the police court "which shows that petitioner was tried (arrested) for any offense of "which the court had jurisdiction." (Ex p. Kearny, 55 Cal., 220.)

"The complaint in the police court should state facts." (Penal code, sec. 1426.)

There is no direct allegation in the complaint that there is such an order as No. 1589 or 1845, and the absence of such averment makes the complaint fatally defective—it charges no crime.

The code provides:

"In pleading a private statute, or a right derived therefrom, it "is sufficient to refer to the statute by its title and the day of its "passage, and the court must thereupon take judicial notice there-"of." (§963 penal code; §459, C. C. P.)

"If such an order existed, it was the duty of the defendant to "have pleaded, and put it in evidence so as to inform the court and "jury of his power and authority. * *

"The courts will not take judicial cognizance of orders or laws, "of a municipal corporation. If relied on, they must be pleaded "and proved as are other facts." (McDonald *v.* Lane, 5 S. E. REP., 629.) 80 Ga., 497.

Boone *v.* Alexander, 7 So. 437.
Woods *v.* Prineville, 23 Pac., 880.

The police court had no jurisdiction.

"Without proof, the court could not take knowledge of such fact, "and such proof could not be made unless the fact were alleged in "the indictment." (Norton *v.* State, 3 SO. REP., 666.)

"The code defines the knowledge of the court." (§§1827-1875, C. C. P.)

"The court will take judicial notice of the laws of the state." (§1875, C. C. P.)

"The written law of this state is contained in its constitution and "statutes, and in the constitution and statutes of the United States." (§1897.)

This quotation from the code is express in its inclusion and exclusion, and excludes city orders from the knowledge of the court, unless pleaded.

After the people have pleaded the order they may prove it as follows:

"The acts of a municipal corporation of this state may be proved "by a copy, certified by the legal keeper thereof, or by a printed "book published by the authority of such corporation." (§1918, par. 5, C. C. P.)

The police court had no jurisdiction of the subject of the action, const., art. vi., §5, therefore the warrant is void.

Our "license fee is a tax." (People *v.* Martin, 60 Cal., 153.)

When we are put on trial for our liberty, we believe that we ought to be tendered an issue in a court having jurisdiction to try all the allegations upon every fact on which the result of the contention may depend.

Can we be imprisoned for the non-payment of a tax, if there was no legal or valid taxation?

We suggest that the validity of the tax is as much in issue, as the allegation, that we did not pay it.

Neither the validity of the tax or the non-payment thereof, are alleged, except inferentially, which as we have shown, is not sufficient.

The pleading which calls us to trial in this prosecution is not, to us a frivolous affair.

It goes to the jurisdiction of the court.

Our constitution, art. vi., §1, has located the judicial power in the courts.

In §5 it has placed in superior court the jurisdiction of an action at law, involving the validity of any tax, and of misdemeanors not otherwise provided for.

A criminal prosecution for non-payment of a tax is undoubtedly an action at law, and if we may question the validity of the tax, it is "a misdemeanor not otherwise provided for." (Green *v.* superior court, 78 Cal., 556; 82 Cal., 182.)

How can these questions be brought to issue except by the pleadings?

If the pleadings do not show the issue, are we not denied due process of law?

Suppose it be alleged that a tax was imposed which we failed to pay, and thereby exposed ourselves to punishment, can we be punished, except by a court? What court has jurisdiction in case we deny the validity of the tax? *Ans.*—The superior court, with appeal to supreme court.

We claim the right to be heard in proper tribunal.

If this right is denied, we believe we are denied due process of law.

The legislature cannot alter a jurisdiction prescribed by the constitution. (Camron *v.* Kenfield, 57 Cal., 550; F. U. *v.* Thresher, 62 Cal., 407; Hobart *v.* Tilson, 63 Cal., 211; People *v.* Josselyn, 80 Cal., 544.) The prosecution against us is a criminal action for guilty non-payment of a license tax, which the people have prevented us from paying. The police court cannot determine the validity of the

tax, and consequently cannot try the case (Monterey *v.* Abbott, 77 Cal., 541.) The act prescribing the jurisdiction of the police court, statutes 1889, page 62 (*Re* Lloyd, 78 Cal., 421), cannot invest the police court with power to try a question which the constitution commits to the superior court.

Green *v.* Superior court, 78 Cal., 56.
Peop. *v.* Lawrence, 82 Cal., 182.

Order 1845 is void.

We say §435 of the penal code was, on July 28th, 1880, a general law in force in San Francisco. This position is indisputable on the authority of the following cases. (22 Pac., 1042.) See 30 cases cited on p. 4, ante.

It was, therefore, a violation of this general law for the board of supervisors, on July 28, 1880, to prescribe the penalty of $1,000, as they have done in order 1589, §1.

It was also a violation of the act of May 18, 1861, because the condition stated in that act was *where no penalty is affixed thereto.*

We have noticed and traced the conflict of authority which prevailed at the time of the passage of this order, and for years afterwards, and was settled by this court July 14, 1887, in *Re* Sic 73, Cal., 149.

The will of the municipality and the will of the state cannot operate as contrary forces on this question at the same time and place.

"In legal contemplation, there can no more be two valid laws "which are in conflict, operating upon the same subject matter at "the same time, than in physics two bodies can occupy the same "space at the same time." (*Re* Neagle, 39 Fed., 833.) Sept. 16, 1889.

To prosecute a person under an order which is repealed, is *not due process of law.*

Order 1845 is repealed.

We raised the point in the court below (see p. 31, folio 46) that order 1845 was repealed March 9th, 1886, by the passage of order 1848.

This order can be found at the top of page 96 of the order book printed in 1888.

Again repealed March 2, 1887, by order 1899, which may be found at top of page 84 of said book.

Again repealed by order 2216.

The amendment repealed the previous law.

6 Cal., 384; 7 Cal., 3; 15 Cal., 284; 25 Cal., 596; 63 Cal., 268.
Re Medley, 10 S. C. R., U. S., 384.

Monterey *v.* Abbott, 77 Cal., 541, is conclusive in our favor as to the lack of jurisdiction in our police court.

It is a curious coincidence that order 1589 (*our order*) was held invalid in this court, May 20, 1890.

McCall *v.* Cal., 10 S. C. R. (U. S.), 880.

It is very hard work to enforce the xivth art. in the state courts of California.

Our state did not accept it, and our courts are hard against it.

We refer to Re Fisk, 72 Cal., 125, and see how in three lines on p. 130 the great decision in 118 U. S., 356, is belittled *as an authority*. Twenty pages of elucidation of constitutional law by the greatest tribunal on the face of the earth is disposed of in three lines by one of our judges, and the rest concur

We send a copy of the city orders as published in 1888, and ask the court to notice page 42, §68; then refer to 118 U. S., 356, and observe that our board of supervisors has found time to pass nearly 600 orders since that decision, and has not had the grace to eliminate §68, and repass the remainder of the order.

In the 1888, two years after 118 U. S., 356, our board reprint the order valid and invalid, without any note to warn the reader that §68 is *bad* or that *this court* had ever spoken on the subject.

We say that order 1589 is demonstrated in this court to be bad.

McCall *v.* Cal., 10 S. C. R., 880; May 20, 1890.

Jailer must justify

The respondent has *no better case than he makes* in his return.

"Whoever imprisons another MUST justify by showing specially "to the court that the imprisonment is lawful.

"1 Chitty on Pleadings, 16th Am. Ed., 535; Gallimore *v.* Am-"meriman, 39 Ind., 318; Carey *v.* Sheets, 60 Ind., 20, 21; People "*v.* McGrew, 77 Cal., 570."

Ah Fong *v.* Sterns, 79 Cal., 32.

By the judges of England, A. D. 1627, *Hurd, H. C.*, §375.

"Facts must be stated."

San Luis *v.* Hendricks, 71 Cal., 246.

Hedges *v.* Dam, 72 Cal., 522.

"Liberty is the imperishable and inalienable right of every per-"son in this broad land."

100 U. S., 257-392.

"To fortify and secure that right, the 14th amendment was "adopted."

100 U. S., 396.

Independently of our defense of invalidity of the tax in its practical operation on petitioner, the petitioner *must be discharged* because the return is *fatally and irremediably* defective.

If our prosecuting attorneys do not draw proper pleadings, it is not an interference with the police powers of the state for the circuit court to liberate a man who "*is deprived of his liberty by the state without due process of law*" in violation of the 14th article.

Proof is not admissible in court unless it be in support of an allegation.

If the pleader omits to make the proper averments, the court will not help him out.

Our supreme court has held in more than a dozen cases that decisions outside the findings, and findings outside the pleadings are erroneous. Cummings *v.* Cummings, 75 Cal., 441; 33 Cal., 474; 39 Cal., 344; 41 Cal., 286; 46 Cal., 288; 50 Cal., 552; 54 Cal., 20; 55 Cal., 91; 59 Cal., 99; 64 Cal., 594; 71 Cal., 119; 75 Cal., 640; 76 Cal., 49; 22 Pac. R., 284.

We stand upon these cases and say that in our situation there are open to us two plain legal and just defenses.

One is that we paid the tax.

The other is that *there is no tax to pay.*

This raises a question of constitutional law. If the tax is invalid, the police court had no jurisdiction to issue the warrant.

People *v.* Pittsburg, 67 Cal., 625.
Re Kearney, 55 Cal., 220.
McCall *v.* Cal., 10 S. C. R., 880.

On this question we are entitled to be heard here.

How can we be heard except on proof?

How can proof be received except to prove the issues?

How can the issues be joined except by the pleadings?

"A habeas corpus is a civil action." (108 U. S., 557; 110 U. S., 385.)

"Judicial remedies are administered by courts empowered by the "constitution." (Section 20, C. C. P.)

"A civil action is prosecuted by one party against another for "the enforcement of a right, etc." (Sections 22, 24, 25, 26, 30, C. C. P.; 108 U. S., 557; 110 U. S., 385.)

"The pleadings are the formal allegations by the parties of their "respective claims and defenses for the judgment of the court. The "forms and sufficiency of pleadings in civil action are prescribed by "this code." (Sections 420–1, C. C. P.)

"Evidence must correspond with the substance of the material "allegations, and be relevant to the question in dispute." (Section 1868, C. C. P.)

"Each party must prove his own affirmative allegations." (Section 1869, C. C. P.)

"There is wholly wanting a direct and positive averment that "there was, at the time of the explosion, a city ordinance in exist-"ence forbidding the storage of powder within corporate limits in "excess of 50 pounds. To say that the storage in such quantity "was in violation of an ordinance, may be a persuasive, indeed an "infallible argument that such ordinance existed, but it falls short "of an affirmative, direct allegation to that effect. That argumen-"tative pleading is *not permissible*, is elemental."

"The defendant in a criminal action is entitled to demand that

" whatever accusation is made against him, shall be made in a posi-
" tive, direct form, leaving nothing to inference or argument, so that
" the issue may be one of fact and not logic."

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" Facts must be stated."

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24 Tex. Ap., 400.

" The reference to the order, by number, title and date, was not *sufficient.*"

Pomroy *v.* Lappeus, 9 Or., 364.

" If not recited in full, at least the provisions of the order charged
" to have been violated, should have been recited. The want of
" such allegations *rendered it fatally defective.*"

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" Ordinances are not public *and must be pleaded.*"

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West *v.* Blake, 4 Blackford, 234.
Briggs *v.* Whipple, 7 Verm., 15-18.
Case *v.* Mobile, 30 Ala., 538.
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Clevenger *v.* Bushville, 90 Ind., 261.
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Norton *v.* State, 3 So. Rep., 666; 65 Miss., 297.
McDonald *v.* Lane, 5 So. Rep., 629; 80 Ga., 497.
Ninenger *v.* State, 8 S. W. R., 480; 25 Texas Ap., 449.
Garland *v.* Denver, 19 Pac., 461; 11 Colo., 534.
Bishop Crim. Pro., 608.
Bishop on Stat. Crimes, 406.
Cunningham *v.* Berry, 22 Pac., 115.
People *v.* Hancock, Feb. 25th, 1890. By Van Reynegom. See end of this brief.
Toole *v.* State, 7 So. Rep., 42-6. Please read whole case.

There is no direct allegation that there is such an order as No. 1589 or 1845.

The code provides:

" In pleading a private statute or a right derived therefrom, it is
" sufficient to refer to the statute by its title and the day of its pas-

" sage, and the court must thereupon take judicial notice thereof." (Section 963, penal code; Section 459, C. C. P.)

" If such an order existed, it was *the duty of the defendant to have* " *pleaded, and put it in evidence* so as to inform the court and jury of " his power and authority."

" A PARTY MUST ALLEGE EVERY MATERIAL FACT WHICH HE IS REQUIRED " TO PROVE AND WILL BE PRECLUDED FROM PROVING EVERY ANY FACT " NOT ALLEGED." (82 CAL., 323.)

" The courts will not take judicial cognizance of orders or laws " of a municipal corporation. If relied on, they must be pleaded " and proved as are other facts." (McDonald *v.* Lane, 5 S. E. Rep. 629.) 80 Ga., 497.

" Without proof *the court could not take knowledge* of such facts," and such proof could not be made unless the " fact were alleged in " the indictment." (Norton *v.* State, 3 So. Rep., 666.) 65 Miss., 297.

" The code defines the knowledge of the court." (Sections 1827-1875, C. C. P.)

" The court will take judicial notice of laws of the State. (Sec- " tion 1875, C. C. P.)

" The written law of this state is contained in its constitution " and statutes, and in the constitution and statutes of the United " States." (§ 1897.)

This quotation from the code is express in its inclusion and exclusion, and excludes city orders from the knowledge of the court, unless pleaded.

After the respondent has pleaded the order, he may prove it as follows:

" The acts of a municipal corporation of this state may be proved " by a copy certified by the legal keeper thereof, or by a printed " book published by the authority of such corporation." (Section 1918, par. 5, C. C. P.)

As the pleadings now stand in the police court, the respondent CANNOT prove the order because there is no allegation in the pleadings to which such proof can respond. 82 Cal., 323.

The allegate and probate must agree.

" The police court is of limited jurisdiction, its proceedings " must show affirmatively jurisdiction of the person and the subject " matter. Everything should appear in its proceedings, necessary " to give it jurisdiction and to justify its judgment." (Exparte Kearney, 55 Cal., 220.)

" A person imprisoned under a *void ordinance* is imprisoned by " the state without due process of law." (Yick Wo *v.* Hopkins, 118 U. S., 356.)

" Nothing is presumed in favor of the judgment of the police " court. If the record does not show upon its face the facts neces- " sary to give the court jurisdiction, THEY WILL BE PRESUMED NOT TO " HAVE EXISTED. It *devolved, therefore, on those whose function it was*

" *to sustain the jurisdiction to produce the ordinances in order that it* " *could be ascertained whether they made the act charged against the* " *prisoner* A CRIME."

" Whether the orders gave the police court power to punish for " the offense charged in the complaint IS A QUESTION OF LAW, which " we cannot avoid the responsibility of deciding." (Exparte Kearney, 55 Cal., 228.)

" The existence of a valid order, WAS INDISPENSABLE to give the " police court jurisdiction to issue the warrant of August 6th, 1890."

" This fact is not shown in the return. The presumption is that " it does not exist."

" The jurisdictional facts must be apparent on the face of the " proceedings or the judgment is void." (Exparte Kearney, 55 Cal., 228, citing Jolly *v.* Foltz, 34 Cal., 321.)

We ask special attention to the definition of due process of law given by Mr. justice Miller, quoted fully in Chauvin *v.* Valiton, 20 Pac. P. P., 660 to 664 inclusive.

Paulsen *v.* Portland, 10 Pac., 451; 16 Or., 450.

In the police court complaint returned by respondent, *there is no averment that any* license had been imposed on the *business of selling liquors by petitioner.* Thereby violating sections 1 and 2 of order 1589, does not state any crime. They have no better complaint to show, consequently they cannot amend. The complaint is *utterly bad under* all decisions. "*It is not due process of law.*"

The complaint shown in the case charges no crime.

It fails to state (except inferentially) that there is any license to be paid.

McDonald *v.* Lane, 5 S. E. Rep., 629; 80 Ga., 497.

Norton *v.* State, 3 So. Rep., 666; 65 Miss., 297.

" The return is faulty. It does NOT ALLEGE than any order was " made by the board of supervisors."

Re Fil Ki, 80 Cal., 202.

" The well-settled rule, that a defendant shall not be convicted " unless the evidence prove his guilt beyond a reasonable doubt, " applies to the whole and every material part of the case, no mat- " ter whether it is as to the killing, or the reason for or manner of " its commission."

People *v.* Bushton, 80 Cal., 164.

Proof to the whole and every material part of the case, would not be receivable unless there was averment to support it. In our case there is no averment of the existence of any order 1589 or 1845. Orders must be pleaded and proved as other facts. 5 S. E. R., 629; 80 Ga., 497; 82 Cal., 323.

It is more in harmony with our system to set forth the instrument on which action or defense is founded, and the instrument must be free from defect or ambiguity. (Lambert *v.* Haskell, 80 Cal., 613.)

As to the pleading facts please see Albertole *v.* Branham, 80 Cal., 631.

We find also in Prentice *v.* Miller, 82 Cal., 570, Jan. 27, 1890, and in Bode *v.* Trimmer, 82 Cal., 513, Jan. 11th, 1890, this doctrine: "In cases of this kind each party is an actor, and must set forth in his pleading and show by his proofs, that he has strictly complied with the law, and by such compliance has become entitled, etc. If he fails to this, he can obtain no assistance from the courts," citing

Woods *v.* Sawtelle, 46 Cal., 392.
Cadierque *v.* Doran, 49 Cal., 356.
Christman *v.* Brainard, 51 Cal., 536.
Lane *v.* Pferdner, 56 Cal., 122.
Gilson *v.* Robinson, 68 Cal., 543.

Suppose that in the light of Peop. *v.* Bushton, 80 Cal., 160, we paraphrase our complaint.

That at on , 1889, defendant did wilfully and unlawfully shoot a gun, etc., thereby killing and murdering John Doe, etc.

Question.—Would such an averment be sufficient? We think not. There is no direct averment that there was such a person as John Doe, or direct averment of his death, or that it resulted from the gun-shot wound. It is true that these matters are inferentially pleaded, but inferential pleading IS BAD pleading.

There is one thing the State of California, under the XIVTH ARTICLE, is forbidden to do: That is, to put a man on trial in an inferior court on a written charge in which one-half of the chain of facts necessary to constitute a complete crime is assumed to be true, and the other half of said chain is stated to be true. This is our very situation. The validity of order 1589 is assumed below, before our warrant is issued. When called to trial we shall have no inspection of the order, no issue tendered or allowed as to its validity on its face, or the regularity of the proceedings on its passage.

We ought to be allowed to test the validity of the order in the police court, and such a rule would tend to lighten the labors of the higher courts.

As we understand *Re* Kearney, 55 Cal., 220, the orders *must be pleaded and proved* in the court below.

It is the constitution and statutes of this state and the United States, which constitute the written law of the state (Section 1897, C. C. P.), which the court knows and of which citizens and strangers alike must take notice at their peril.

Nobody knows the ordinances of the board of supervisors. They are to be pleaded and proved. This day in court, cannot be denied to any person by the state.

We rely on 22 Pac., 115. Please read *the whole case.*

Being arrested on this complaint which as we have shown states no offense, and charges no crime, we are dragged to the police court.

"No person can be punished except on *a legal conviction in a court having jurisdiction.*" Penal code, section 681.

We file a plea to the jurisdiction as stated in our traverse. (See tr., p. 35, fol. 61.)

The original is here admitted in evidence with consent of the district attorney.

This plea ousted the jurisdiction of the police court.

Monterey *v.* Abbott, 77 Cal., is conclusive on this point.

Granting that a certain statute seems to locate the jurisdiction in the police court, our court has said: "An unconstitutional law is no law."

S. F. *v.* Ins. Co., 74 Cal., 123.

If we are forced to trial in a court *without jurisdiction*, are we not *deprived of our liberty* without due process of law, in violation of the xivth art.?

The police court had no jurisdiction of the subject of the action (const., art. vi, sec. 5), therefore the warrant is void.

"Our license fee is a tax." (People *v.* Martin, 60 Cal., 153.)

When we are put on trial for our liberty, we believe that we ought to be tendered an issue in a court *having jurisdiction to try all the allegations* upon every fact on which the result of the contention may depend.

Can we be imprisoned for the non-payment of a tax, if there was no legal or valid taxation?

67 Cal., 625.

We suggest that the validity of the tax is as much in issue, as the allegation that we did not pay it.

Neither the validity of the tax nor the non-payment thereof, are alleged except inferentially, which, as we have shown, is *not sufficient*.

The pleading which calls us to trial in this prosecution is not to us frivolous affair.

It goes to the jurisdiction of the court.

Our constitution, art. vi, section 1, has located the judicial power in the courts.

In section 5 it has placed in the superior court, the jurisdiction of an action at law, involving *the validity of any tax*, and of misdemeanors not otherwise provided for.

A criminal prosecution for non-payment of a tax is undoubtedly an action at law, and if we may question the validity of the tax, it is "a misdemeanor not otherwise provided for."

Green *v.* Superior court, 78 Cal., 556.

Peop. *v.* Lawrence, 82 Cal., 182.

How can these questions be brought to issue except by the pleadings?

If the pleadings do not show the issue, are we not denied *due process of law?*

Suppose it be alleged that a tax was imposed which we failed to pay, and thereby exposed ourselves to punishment, can we be punished, except by a court? What court has jurisdiction in case we

deny the validity of the tax? Ans.—The superior court, with appeal to the supreme court.

We claim the right to be heard in proper tribunal.

If this right is denied, we believe we are *denied due process of law*.

Due process of law.

If the statute entitles us to our discharge, and we are unlawfully arrested, this court must look at the statute to see if we are denied due process of law.

Our plea to the jurisdiction is a *perfect bar* to the complaint pleaded here in the return.

This point is too clear for argument. Nothing can be said to make it clearer.

The police court denied to us the EQUAL PROTECTION of the law.

Appellee invites the attention of this court to the fact that the state by her attorney-general, or district attorney, does not appear in this record, and that it is not usual to allow private counsel to handle the public cases in the interest of rival saloon-keepers.

The attorney-general, Hon. George A. Johnson, and the Hon. J. D. Page, district attorney, and Hon. Jo. J. Dunn, prosecuting attorney of the police court, all appeared on the first argument in our state supreme court, and the latter gentleman filed a brief which yet remains on file, in which, when speaking of 118 U. S., 356; 7 Saw., 531; 13 Fed., 229; 26 Fed., 471, and 31 Fed., 680; he says on pages 22, 23, in sober print, "*I cannot agree to the correctness of these rulings.*"

It is not less strange than it is true that our local courts follow the example set by our state supreme court; Re Fisk, 72 Cal., 130, of disparaging the decisions of the supreme judicial power of the nation.

This sort of secession requires a prompt and vigorous check.

Our state supreme court in 24 Pac., 747, admits that these orders do contravene the general laws of the state in two particulars; *first*, in *fixing the* penalty; and, *second*, in *prescribing rules of evidence.*

Now the constitution in art. xi., ⅋xi., limits the powers of counties to the passage of orders "which are not in conflict with general laws."

It must follow that an order which *does conflict with general laws* IS VOID.

We have mailed Oct. 16th, a certified copy of these orders.

On inspection of this paper, the court will see that 1848 and 1899 are entireties, and they displace and repeal all of ⅋10 which they do not expressly re-enact.

Order 1845 not legally passed.

Order 1845 has not been legally passed.

Order 1589, passed July 28, 1880, seems to have been amended: In ⅋18, March 8th, 1881, by order 1618.

EPOCH OF THE COUNTY GOVERNMENT ACT.

In sub. 35 of §10, June 26, 1883, by order 1724.
In sub. 22 of §10, Oct. 30, 1883, by order 1745.
In sub. 39 of §10, Jan. 19, 1886, by order 1845.
In sub. 47 of §10, March 9, 1886, by order 1848.
In sub. 8 of §10, March 2, 1887, by order 1899.
In sub. 2 of §12, March 2, 1887, by order 1899.

The petitioner on January 15, 1890, in open court, furnished the state court with a certified copy of the above orders.

In none of these amendments was §68 *a* of the consolidation act, or §26 *b* of the county government act complied with.

Note.—(*a*) Stat. 1856, p. 163; or Worley's consolidation act, 1887, p. 16.
(*b*) §26 of county government act, 1883, p. 309. Took effect May 14, 1883.

The whole order 1589 as amended, was not in any of these instances published and passed as required by §68 *supra*, nor were any of the amendments published for a week as required by §26 *supra*.

Order 1589 is not now the same as when published in full with the ayes and noes in July, 1880.

The first section contains a penalty for any violation of *this order*.

The printing of the whole order would be a vain and useless act, if the sections which encompass the liberty of a citizen could be afterwards expanded, so as to make him criminally liable for an act, which was not penal when the penalty was adopted.

The new method dates May 14, 1883, from the county government act, stat. 1883, p. 309.

The county government act "is a general law."

Re Benjamin, 65 Cal., 313, *Id.* 124–288.

The legislature shall establish a system of "county governments "which shall be uniform throughout the state." (Const., art. xi., §4.)

Suppose that in doing this, the legislature is confronted by *a consolidation act* passed in 1856, which shall give way?

The act of 1856; or, the legislature of 1883 enforcing the constitution of 1879?

This question has been answered so often by this court that it seems impertinent to ask it again.

How can the legislature ever exercise this power if it is to be confronted with impenetrable *consolidation acts* which defy the legislative power?

The place for the location of such fortresses would seem to be without, and not within the limits of the state, for as surely as heat thaws ice, these claims must melt before the legislative power.

"A county is the largest political division of the state having cor-"porate powers."

"San Francisco is a county." (Pol. code, §§3901–3950.)

The county government act (§§162–163) recognizes San Francisco as a county of the first-class, and provides for the payment of her officers as such.

When this general law took effect it repealed (§184) all laws in conflict therewith.

Exparte Benjamin, 65 Cal., 311.

Fraser *v.* Alexander, 75 Cal., 154.

It follows that after the county government act took effect, our board of supervisors should have *assessed* the municipal license tax as required by art. xi., §12 of the constitution and sub. 27 of §25 of the county government act.

The manner of doing so is prescribed in §26 of the same act, and the manner being essential must be followed.

People *v.* Russell, 74 Cal., 578.

State *v.* Patterson, 4 S. E. Rep., 351; 98 N. C., 666.

Montgomery *v.* Abbott, 77 Cal., 541.

Bay *v.* O'Donnell, 87 Ala., 376; 6 So., 120.

"Ordinance A is null and void for want of compliance with the county goverment act."

"The essential thing to be done was the publication of the order for at least one week."

San Luis *v.* Hendricks, 71 Cal., 246.

"The whole ordinance was not published."

People *v.* Russell, 74 Cal., 578,

Ordinance 1845 was not published with the proper enacting clause, "viz.: the board of supervisors do ordain as follows," and *was not published for one week* after passage, and the whole order intended to be amended was not published. It therefore falls under the unanimous opinion of the seven judges of our court in People *v.* Russell, 74 Cal., 578.

No distinction can be made between the applicability of the county government act to San Francisco and the election law which was passed on by this court in Staude *v.* El. Com., 61 Cal., 323.

The power and duty of the legislature to pass both of these acts springs from the same section of the constitution, viz.: art. xi., §5, and both subjects are so welded together that they seem to be co-existent and co-terminous.

The general permanent powers of "the board of supervisors" are prescribed by §25 of this act.

Among the powers granted by §25 are (sub. 27) "to license for "the purpose of regulation and revenue, all and every kind of busi- "ness carried on in such county, etc. And to provide for the col- "lection of the same by suit or otherwise."

Sub. 33. "To make and enforce within the limits of their county "of such local police, sanitary and other regulations as are not "in conflict with general laws."

In §31 of this (county government) act we find a provision in regard to a witness being brought before a judge of the superior court of a "city and county." This means San Francisco and no other place.

"The legislature may by general laws vest in the corporate au

"thorities, the power to assess and collect taxes for such (munici-
"pal) purposes." (Const., art. xi., §12.)

"The legislature by general and uniform laws shall provide for "the election * in the several counties in this state of boards of "supervisors * * *and shall prescribe their duties.*" (Const., art. xi., §5.)

"The legislature shall not pass local or special laws. * *

"9th. Regulating county business.

"10th. For the assessment or collection of taxes.

"28th. Prescribing the powers and duties of officers in cities and counties. * *

"33d. In all other cases where a general law can be made ap-
"plicable." (Const., art. iv., §25, subs. 9, 10, 28 and 33.)

"All laws of a general nature must have a uniform operation." (Const., art. 1, §11.)

By command of the constitution, county business must be regulated and *prescribed* by general law.

By prohibition of the constitution it cannot be regulated in any other way.

After these great powers of the new constitution have been exercised by the legislature who, or what power can stay their force or prevent their operation?

This question has been answered by our court (In Staude *v.* Bd. El., 61 Cal., 321,) that these general laws *do repeal* the provisions of the *consolidation act* because the constitution so provides.

This decision stands supported by a brigade of cases which are listed on p. 4 of this brief.

"The legislature can authorize by general laws * ordinances to "be passed by a municipal corporation."

Ex. p. Chin Yan, 60 Cal., 81.

"City and counties heretofore organized shall be subject to and controlled by general laws." (Const., art. xi., §6.)

If the cases above declare the law (and we believe they do,) it results that the general laws of this state do operate in San Francisco, and if so, we claim that the manner of passing orders prescribed by §68 of the *consolidation act* has been repealed by §184 of the county government act.

If the manner of transacting county business prescribed by the county government act is not applicable to San Francisco, the county government act is denied a uniform operation, and becomes a local and special law regulating county business, applicable only to a portion of the state, and thereby art. i., §11, art. iv., §25, ¶¶ 9, 28 and 33, and art. xi., §§4 and 5 would be violated.

"The charter of San Francisco is subject to general laws." (Cases cited on pp. 4 and 5 ante.)

Order 1845 is void.

Order 1845 conflicts with the state law on the same subject.

§435 of penal code provides a punishment of "imprisonment for "six months or fine not exceeding $500, or both," for doing a business without a license.

Order 1589, §1, provides "a fine not more than $1000 or impri- "sonment not more than six months or both."

The act of March 30, 1872, p. 736 (Worley's consol. act., A. D. 1887, p. 145), provides "shall be deemed guilty of a misdemeanor and fined not less than $100, or by imprisonment not exceeding 30 days in case the fine is not paid."

Order 1845 prescribes the punishment of "misdemeanor."

The consol. act as amended May 18, 1861, page 544, (Worley, 19-20) gives the supervisors power "to determine the fines for for- "feitures and penalties that shall be incurred for a breach of their "regulations *where no penalty is affixed thereto or provided by law.*"

In our case the penal code fixed the penalty, therefore the supervisors had no power to fix it. There cannot be two sovereign wills operating at the same time and place on the same thing. *Re* Neagle

But some one may say: This is not a case of conflict but of harmony. That both the statute and order command that the offender shall be punished.

The answer is: We are not punishable at all unless there is a valid order. If the board of supervisors (forgetting or disregarding the limits of their power "to fix the rate of license, and provide "for the collection of the same by suit or otherwise") have passed an order which they had no power to pass, the only sentence which the law can give is to hold the order void. There can be no harmony between a valid statute and a void ordinance. The sphere of legislative action being fully occupied and possessed by the statute which prescribes the rule (and the only rule) in force upon the subject; there is no vacuum or space to be filled by the order of the supervisors, consequently such an order has neither scope for its operation or subject to operate upon. The usurper cannot obtain recognition on so shallow a deception.

"The ordinance (under which Lawrence was held) was '*a law of this State*' under §435 of the penal code." (*Re* Lawrence, 69 Cal., 611.)

Our court has held that "there is a conflict where the ordinance and the general law *punish precisely the same acts.*" (*Re* Sic, 73 Cal., 149.)

We would ask which of these penalties are we to suffer?

The Sic decision was given July 14, 1887, and it demonstrates that the order now in question is invalid.

Perhaps the act of March 30, 1872, *supra*, was repealed by §184 of the county government act.

Fraser *v.* Alexander, 75 Cal., 154.

People *v.* Henshaw, 76 Cal., 442.

Order 1589 is void because §§4 and 5 thereof conflict with the general laws (§§1823 to 2104 of code of civil procedure) regulating evidence.

Note.—§§4 and 5 may be found on p. 3 of the amended return, also on p. 80 of the edition of 1888 of orders of the board of supervisors of San Francisco, seven copies furnished herewith by petitioner in open court, January 15, 1890, for use of the court.

The power of the board of supervisors is limited (by xi-xi of the constitution and by subdivision 33 of §25 of county government act.) to the passage of such orders as are *not in conflict* with general laws.

The consolidation act forbids any attempt to establish rules of evidence.

"The powers of the board of supervisors are those granted by this act, and they are prohibited to exercise any others." Consolidation act, §67; statute 1856, p. 163; Worley, p. 15.

These objectionable sections are a part of the general plan of order 1589.

They enter into the body of the order, and control the application of it in every instance. Their plain and inexcusable illegality renders the whole order void. (Re Sic, 73 Cal., 149.) The complaint and warrant on which we are arrested has a reference to these sections.

Order 1589 is void because it attempts to define the meaning of words, and conflicts with §§16 and 17 of the political code.

§12 of this order* is devoted to defining the meaning of words. These definitions (for all we know to the contrary) may have contained the inducement which secured the passage of the order. What mysteries may lurk in these provisions we are not here called on to explain. It is enough to say that the board has no such power, and the attempt to exercise it conflicts with the general laws of the state.

**Note.*—Please see page 96 of the edition of 1888, city orders, furnished by petitioner.

"Municipal corporations have no authority to change the meaning of English words."

Mayor *v.* Cincinnati, 1 Ohio st., 268.

The whole order must stand or fall together, as the law required it to be printed together, therefore it cannot be held to be part valid and part void, as might be the case with a statute.

The order conflicts with the state law and is void. (Re Sic, 73 Cal., 143.)

In the Sic case 73 Cal., 148, this court held that if a municipal order conflicted with a general law, the order must be held to be void.

Whether we consider order 1589 under §68 of the consolidation act or under §26 of the county government act, we shall reach the conclusion that the order is void.

The consolidation act required the embryo order to be published five times. Why this publication?

Answer.—In order that the public might know what legislation

was intended. The order that was intended to be passed should be the same that had been printed for five days before passage, and if not so printed the final passage would be void. In other words, for the purpose of getting a valid order, there must be a complete script, with no blanks to be filled; a complete publication of the same for five days; and a perfect passage of the same without alteration, and as published. If these conditions fail there is no valid order.

The county government act differs in time of publication and in the enacting clause, but under both acts, conformity to the statute was and is essential.

But it may be true that all these conditions may appear, and yet the order may be void. For example, if the subject of the order be to regulate interstate commerce.

This subject has been transferred by the states to congress, and neither state legislatures nor municipal corporations have any power over it now.

The subject must be one which lies within the field of power granted to the corporation, and the regulations must be free from excrescence and within the municipal power. The regulation must be *not in conflict* with any general law. If the regulation does conflict with any general law, then no matter how good a regulation it may be, it is one which the corporation had no power to make, and therefore totally void.

This is not a question as to how much of a departure by the corporation from the proper field of legislative action can be tolerated, but whether any departure can be permitted.

The answer is that no departure can be tolerated, and any lack of conformity to the legal conditiohs is fatal to the whole order. This will appear more clearly when we remember that the order which is claimed to be valid must have been passed, and that which was passed must be the one which was published, and any variation from the prescribed method would be fatal to the order.

Suppose for illustration that a certain order is passed without the proper enacting clause, this would be fatal to the order. (People *v.* Russell, 74 Cal., 578.) If passed with a wrong enacting clause the result must be the same, because when the statute prescribes the method, that method must be followed (State *v.* Patterson, 4 S. E. R., 351; 98 N. C., 666) and doing the act in a different way is not doing it at all.

Suppose that the topic of the hour is to pass a license order. The subject affects many persons, and not all in the same way, or to the same effect.

Some may be interested in high fines, as possible participators in the division of the fat which is thus gained from the loins of their neighbors.

To them an invasion of the penal code would be a light and incon-

siderable trifle, the gain immediate and substantial. Let them be conciliated.

Others, secure in a secret traffic, which needs no advertising, desire to make their less fortunate competitors in business pay smartly for displaying signs, and a little joker can be inserted, making a sign *conclusive evidence*. This concession purchases the support of this cohort for the passage of the order.

Others again see a way, by defining certain words, to tax their neighbors and not themselves, and another cohort rallies to support the order.

When this order thus passed comes before the court, the court may say this provision is clearly invalid, this other provision seems free from objection.

It must be remembered in such a case that the municipality may make another attempt to pass the order and leave out the invalid portion. If this is not done the invalidity of a part vitiates the whole order which it thus attaints.

The court cannot say of order 1589 that §§1, 4 and 5 and 12 are not part of the order. They entered into the publication. It was the order containing these sections that was published and passed and not the order minus these sections.

The order minus these sections was never either published or passed. The courts cannot measure the influence of a void or invalid section on the passage of an order, and the only rule which will cure such disorders is to set aside all orders which conflict with general laws. This ruling will cure the mischief.

The power to pass any order is limited to the proviso that it must not conflict with general laws, and if it does so conflict, the penalty is not the death or excision of the invalid, diseased or corrupted part, but the extinction of the whole scheme. No such diseased and illegal thing can breathe the breath of life. The courts do not sit to aid the instigators of such plans by cutting out those parts which are clearly illegal, but to doom to silence and oblivion every municipal order which exposes such a taint.

And this must be so when it is considered that no court after the order is passed can alter the publication which is already finished. An invalid section in a *statute* (not germane to the main subject of the act) may be disregarded as blank and the remainder of the statute may stand, but this cannot be so with an order, because it cannot be passed with blank sections for the reason that the law requires the text to be printed and published.

To presume that the counsel or the people did not mean to violate the general laws of the state when orders bearing such provisions are solemnly passed, would be absurd. To presume that the obnoxious section was a blank when in reality it was (as in our case,) a regulation conflicting with the general law would be a presumption contrary to the truth and against public policy.

This chain of reasoning supports the decision in 73 Cal., 148,

which holds the order to be void when it conflicts with the general law of the state.

Appellee earnestly prays that this great court will examine our contentions and declare the law on the important questions we present.

Case 118 U. S., 356, condemns the evil eye and the unequal hand of prejudice and partiality.

We have shown the strongest possible illustration of unjust and arbitrary persecution.

Respectfully submitted,

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Oct. 18, 1890.

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